This watermark does not appear in the registered version - http://www.clicktoconvert.com

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
Thursday, 9:30 a.m.
March 18, 1999

TRIAL - VOLUME 256

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Substantial portions of www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suppported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

(APPEARANCES - Continued)

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

I N D E X

WITNESS	PAGE
ALEXANDER SPEARS, PH.D.	
Continued Cross by Mr. Rosenblatt	28252
Redirect by Mr. Ross	28322

E X H I B I T S

PLAINTIFFS' EXHIBITS	OFFERED PAGE	ADMITTED PAGE	FOR ID PAGE
None			

E X H I B I T S

DEFENDANTS' EXHIBITS	OFFERED PAGE	ADMITTED PAGE	FOR ID PAGE
None			

http://legacy.library.ucsf.edu/tid/wtf07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

(Whereupon, the following proceedings were had:)

THE COURT: Good morning, all. Everybody feel all right?

MR. ROSENBLATT: Yes.

THE COURT: And in this corner, and in that corner?

MS. ROSENBLATT: A little tired reviewing all those depositions.

THE COURT: I think we reached that point that usually comes at trials where things sort of fester up and we need to step back and take a deep breath. Hopefully we all did that.

All right. We still have Dr. Spears on the stand. We have to complete his testimony today, and then we'll get into the other matter that we have to talk about.

MR. HEIM: Your Honor, let me make a suggestion in that regard. I think the subject of the depositions of Drs. Wanner and Pearlman are going to take up a fair amount of our time, a little bit of the Court's time and a fair amount of counsels' time. The reason I say that is there is first the question of whether Your Honor will permit us.

The second is the question of dealing with plaintiff counsels' objections and cross-designations

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

which we received this morning. And I understand Susan had to do them last night. I'm not complaining about it. But it's going to take some time now for us to go through them and see if we have any objections to cross-designations. You know the drill certainly better than I.

So my suggestion would be that we p d with Dr. Spears. Whenever we finish with Dr. S ars my suggestion would be we let the jury go at that point. My guess is somewhere around lunchtime. We'll deal with the rest of this stuff this afternoon, and then we'll have another witness here tomorrow.

THE COURT: Well, we'll see. Right now I want to get Dr. Spears on. I want to finish his testimony so he can get out of here, and then we'll take up the next issue.

MR. HEIM: Sure.

THE COURT: Okay. So if you're prepared, bring in Dr. Spears and the jury.

THE BAILIFF: Jurors entering the courtroom.

(The jurors entered the courtroom.)

THE COURT: Okay. Have a seat, folks. How is everybody?

THE JURORS: Fine.

THE COURT: Good. Anything unusual occur

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

last night that we ought to know about?

All right. Has anybody seen anything, read anything, heard anything, talked about anything that may relate to the case or tobacco or to any of the allied issues that we talked about?

THE JURORS: No, sir.

THE COURT: Nothing. Okay. Hopefully the rest of your lives won't be as uneventful.

Okay. We are now still in the middle of the cross examination of Dr. Spears, and I'll ask counsel to continue at this point.

MR. ROSENBLATT: Thank you, Judge.

Good morning, ladies and gentlemen.

THE JURORS: Good morning.

MR. ROSENBLATT: Good morning, Dr. Spears.

THE WITNESS: Good morning, Mr. Rosenblatt.

CONTINUED CROSS EXAMINATION

OF ALEXANDER SPEARS, PH.D.

BY MR. ROSENBLATT:

Q. You do have an "S" at the end of your name. It's Spears?

A. Yes.

Q. Okay.

Yesterday the name of Dr. Wynder was brought up on numerous occasions. Is it fair to say that

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Dr. Wynder became a well-known figure in the field of tobacco and health with the publication in 1953 in the journal Cancer of his research at Sloan-Kettering about tumors growing on the backs of mice, where he had rubbed tobacco condensate?

I mean, that was the first time the world really heard of Wynder, correct?

A. I believe that's correct.

Q. Okay. Now, you were mentioning in much more recent times that Lorillard had some kind of connection or relationship with Drs. Wynder and Hoffman, correct?

A. Well, not much more recent than that, but in the '50s.

Q. Okay. Now, in that relationship between Lorillard and Dr. Wynder, Lorillard paid for part of Wynder's expenses in connection with his research; is that correct?

A. Well, some of this was before I joined Lorillard.

Q. I understand.

A. But my understanding is that the things that Lorillard paid for were rather minimal expenses; for example, cost of the animals in some of the experiments.

Q. And at some point in his career, Dr. Wynder

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

became the founder and I guess the director of an organization called the American Health Foundation?

A. That's correct.

Q. Okay. Now, the American Health Foundation, like many foundations or organizations or groups that do research, are always looking for funding from one source or another; is that generally accurate?

A. Yes. I think that's correct.

Q. Okay.

Now, you had said yesterday, when I asked you the question whether or not any medical doctors had ever worked directly for Lorillard, and I believe your answer was no, but you did mention that over the years you had M.D. consultants, correct?

A. Well, they were working on projects; they weren't just consultants. They were working on projects in conjunction with Lorillard.

Q. Now, I think one M.D. who falls in that category would be a Dr. Morris Fishbein, correct?

A. Back in the 1950s, he was retained as a consultant, I believe.

Q. He was a consultant to Lorillard, which means in that relationship, there's a -- also a financial relationship, because obviously a consultant gets paid?

A. I would think so, yes.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. Now, Dr. Fishbein had been a former editor of the Journal of the American Medical Association, correct?

A. That's correct.

Q. Okay. And I believe before you joined the research department of Lorillard -- well, you'll put this in chronological order for me. My understanding is that a Dr. Parmale, P-A-R-M-A-L-E, preceded you in the research department; is that correct?

A. He was vice president of research when I joined Lorillard.

Q. When you joined. Okay.

Now, you are familiar with a situation where Dr. Fishbein had written a book, and I think the general subject of the book was on cancer, and Dr. Parmale, who was a Ph.D., not an M.D., Dr. Parmale wanted some changes made in Fishbein's book, correct?

A. In one of the chapters, I believe that's correct.

Q. Okay, in one of the chapters.

And without getting into the subjective details, the changes that Parmale wanted, Fishbein made those changes?

A. I don't recall that. But --

Q. Well --

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. Parmale made some suggestions for change, yes.

Q. And to the best of your knowledge, Dr. Fishbein accepted those suggestions for change?

A. I really don't have that knowledge, but --

Q. Okay. Well ---

MR. ROSENBLATT: Page 341.

BY MR. ROSENBLATT:

Q. Starting on Line 11 on Page 341, and referring -- the people we're referring to, Dr. Parmale and Dr. Fishbein.

A. I'm sorry. What are you reading from?

Q. I'm reading -- I don't think your counsel wants me to name exactly what --

THE COURT: Let me see what you're talking about, Counsel.

MR. ROSENBLATT: Or I can just show it to him.

THE COURT: Okay. Counsel will read to you the time and date and place, and your memory will be refreshed.

BY MR. ROSENBLATT:

Q. This was a deposition that you gave, not in this case, on August 14, 1996.

MR. ROSS: Do you have a copy for the witness

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

that he can see?

MR. ROSENBLATT: I don't have an extra copy.

MR. ROSS: I've got one. What was the page number again?

MR. ROSENBLATT: 341.

MR. ROSS: (Handing)

THE COURT: You can look at the front page and you can remember, okay?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. ROSENBLATT:

Q. Where I'm at, Dr. Spears, is Line 11, Page 341, when another lawyer asked you these questions.

Question: Well, in fact, he asked him to soften the implication that cigarette smoking caused human disease, didn't he? Dr. Parmale made that request of Dr. Fishbein, did he not?

Answer: I do not remember the exact detail as to what he asked.

Question: Well, the effect was: Give us a break, wasn't it?

Answer: As I say, he made some suggestions for changes in that chapter. Whether they were accepted was up to Dr. Fishbein.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Question: Well, in fact, Dr. Fishbein made those changes, didn't he?

Answer: I think he did.

So, to the best of your recollection, you think that Dr. Fishbein made the changes that Dr. Parmale suggested in his book on cancer?

A. I agree, I think he did, but I've never made the comparison.

Q. Okay.

And at the time those changes were made by Dr. Fishbein, Dr. Fishbein was receiving money from Lorillard in his capacity as a consultant, correct?

A. I believe that's correct.

Q. Okay.

MR. ROSENBLATT: Mr. Ross, I'm looking for the chart, Lorillard Conducted and Sponsored Research.

MR. ROSS: It's not up there? It might be in the back.

MR. ROSENBLATT: I've got it. Thank you.

BY MR. ROSENBLATT:

Q. And again, I'm going to be so brief with this.

Here's a chart you discussed yesterday. Lorillard Conducted and Sponsored Research. Early smoke chemistry research, going down to additives

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

testing program.

You would agree, would you not, that none of this research resulted in a safer cigarette?

A. I don't know that you can say that. Certainly, if you make the assumption that tar is the active agent, then you would say that cigarettes of today are safer than those of yesterday.

Q. Well, are you willing to say that publicly, under oath, that: My assumption -- Dr. Spears' -- is that the low-tar cigarette is safer, because it's logical to me?

A. It's logical, but I don't think scientifically that statement can be made.

Q. Okay. So other than saying -- I just want to understand your position, and I think I do. I think what you're saying is: It's logical to assume that low tar is probably safer and less hazardous than high tar, but as a scientist I can't make that assertion.

A. Because it's based on basically animal models. There is some epidemiology with respect to one disease that suggests that may be the case; but overall I don't think you can make the statement. It's just not a valid statement scientifically for a lot of reasons, including we don't know how people smoke the cigarettes, we don't know how many they smoke, if they

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

smoke cigarettes with different tar levels.

Q. And this chart, Examples of Test Cigarette Modifications Considered by the Tobacco Working Group, again, when you look at what's under tobacco modifications, you look what's under cigarette construction modifications, if I ask you the question, which I am asking you, can you say that these modifications, these modifications resulted in a safer cigarette, I assume your answer would be the same?

A. It would be the same. I would say in terms of mouse skin, you could say that some of those variables showed a lesser result on mouse skin, and they are incorporated in the commercial cigarettes.

Q. Dr. Spears, when all the CEOs of Philip Morris, Reynolds, Brown & Williamson, Lorillard and Liggett testified before Congress in April of 1994, you were there, correct?

A. Yes.

Q. You heard their testimony?

A. I was -- I'm not sure which one you're referring to, but I was not --

Q. The Waxman Committee.

A. Well, I appeared before the Waxman Committee, certainly, and I was there when the CEOs were there as well, yes.

http://legacy.library.ucsf.edu/tid/wtf07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suggested http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. Okay. Campbell from Philip Morris, Johnson from Reynolds?

A. That's correct.

Q. Then there was -- I forget the first names. Then there was a Johnson of the American Tobacco Company and Horrigan was there on behalf of Liggett, and Tisch was there on behalf of Lorillard, correct?

A. That's correct.

Q. And all of these men were asked questions by the congressmen: Does cigarette smoking cause cancer and other diseases, is it addictive and --

MR. ROSS: Objection.

MR. HEIM: Objection, Your Honor. We've been through this before.

MR. ROSENBLATT: I don't think so.

THE COURT: I don't think so. Overruled. Go ahead.

MR. ROSS: Also, beyond the scope.

THE COURT: Overruled.

BY MR. ROSENBLATT:

Q. And my question is: All of these CEOs before Congress in 1994 under oath were asked the question: Does cigarette smoking cause cancer and other diseases? Is nicotine addictive? They all gave the same answers. They all said it hasn't been scientifically proven that

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

cigarette smoking causes cancer, and they all said -- well, they didn't think it was addictive.

MR. KIRBY: Objection, Your Honor. Mischaracterizes the testimony.

MR. ROSENBLATT: Not at all.

THE COURT: The jury will remember what the testimony was, if the testimony was out. If --

MR. KIRBY: Your Honor, it's testimony before Congress.

THE COURT: Sidebar.

(The following proceedings were had at sidebar:)

THE COURT: Starting early this morning. Okay.

MR. HEIM: Your Honor, my objection originally was because Your Honor had not permitted testimony before Congress to be put before this jury, and I have a sense that that's where this was going, to be asking questions about what they said to Congress through a question of this witness. And that's exactly what happened.

THE COURT: What was your objection?

MR. KIRBY: Well, mine is now that we marched down this road, it was my understanding that it was out of bounds or off limits. It creates the --

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: You're talking about the characterization of the testimony?

MR. KIRBY: Absolutely. That was not my recollection of what the testimony was, and that's what creates the problem of going down this road.

THE COURT: Okay.

MR. ROSENBLATT: He was there. He heard their testimony. If he wants to say no, they didn't say that, that's fine. I'm asking what he heard. It goes to the whole concept of the party line.

THE COURT: Overrule the objection.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Okay. Let me rephrase the question somewhat.

You heard all these CEOs answer under oath the question, and isn't it true that you heard all of them deny that cigarette smoking causes lung cancer, heart disease, and other diseases, and you also heard them deny that nicotine was addictive, correct?

MR. KIRBY: Objection, Your Honor.

MR. MOSS: Same objection.

THE COURT: Overruled.

A. I'm not sure I can remember what each person said. I think they each had a prepared statement and

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

read their prepared statements, and then some questions were asked by Mr. Waxman.

One question related, did they think cigarette smoking was addictive, and as I recall, this was kind of one after the other, the question was asked, and they each provided their own response to that with Mr. Waxman, just saying yes -- say yes or say no.

Individuals did give a more elaborate statement than just the yes or no.

With respect to whether or not smoking caused disease, I don't remember the exact statement, but I think the essence of it was they did not feel it had been proven that smoking had caused disease.

Q. And certainly no CEO admitted that it was addictive, even though they gave an explanation; is it fair to say that no CEO said: Yes, I think my product is addictive? They all said, no, they don't think it's addictive?

A. That's correct. They all said no, with an explanation of why they were saying no.

Q. Okay. And certainly that was Mr. Tisch's position on behalf of Lorillard: hasn't been proven, doesn't cause disease, and it's not addictive?

A. As best I can recall his testimony, that's

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

the essence.

Q. Now, is it fair to say that the goal, the ideal goal of all the smoke chemistry research conducted by Lorillard or commissioned by Lorillard, was to figure out what was harmful or potentially harmful in cigarette smoke or in tar, and then to remove it?

A. That certainly would have been a reasonable goal. We were basically trying to find -- much of the research was aimed at trying to determine what was responsible for the activity on mouse skin.

And as I explained, we also did a lot of work in the area of lung defense mechanisms, and explored what components of smoke might be influencing the response in the bioassay systems that we developed.

Q. Well, today, March 1999, Newport, Kent, True, all your products, still contain nitrosamines, benzopyrene, polycyclic hydrocarbons, and other compounds which have been identified by the scientific community as being carcinogenic; isn't that correct?

A. Yes, they do contain trace amounts of these components, as do many other products, and of course the air we breathe.

Q. Now, the forerunner, the predecessor to the Tobacco Working Group, was a group called the Less

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Hazardous Cigarette Group, correct?

A. That's correct.

Q. And really, all that happened was the Tobacco Working Group changed the name, but the focus was precisely the same as was the focus of the Less Hazardous Cigarette Group, to develop a less hazardous, or put another way, a safer cigarette, correct?

A. That's correct. The National Cancer Institute -- well, it's correct with one exception: that is, your statement that the Tobacco Working Group changed its name. It was the National Cancer Institute that changed the name.

Q. Well, the Less Hazardous Cigarette Group was under the lung cancer task force of the National Cancer Institute, correct?

A. That's correct.

Q. Okay.

A. And --

Q. Did I understand you to say yesterday that one company did not join the Tobacco Working Group, and that was the American Tobacco Company?

A. I said there was not a delegate from the American Tobacco Company.

Q. Okay. Did they ever participate?

A. No, they did not.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. Did they ever give a reason for --
A. No, they did not.
Q. Okay. And you know that the --
A. I should say none that I'm aware of.
Q. And the American Tobacco Company is now part of Brown & Williamson?
A. That's correct.
Q. How many additives are there in Newport?
A. I don't have the exact number.
Q. Give us your best number.
A. Oh, I would say 15.
Q. 15?
A. 15, 20, something like that.
Q. How many in Kent?
A. A similar number.
Q. True, similar number?
A. I would think so.
Q. Are they all the same?
A. No, they're not.
Q. They're all different?
A. No, they're not.
Q. Some are the same, some are different, in the three brands of cigarettes that I named?
A. Yes, that would be true.
Q. Can you name those additives?

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. No, I can't.
Q. Why?
A. Because I haven't memorized them.
Q. Well, if you --
A. I can name some of them.
Q. Is that information that you're willing to make public, the precise additives and the amounts that are contained in Lorillard's brands, or do you consider that to be secret, proprietary information?
A. I consider it to be proprietary information, because it is the -- it represents the items that make brands distinct from one another, and therefore, it's highly-competitive information.
Q. I'm going to ask you a question about an affidavit that you signed in another case September 14, 1996, and I'm going to simply show you the style of the case so it will refresh your memory as to its --
MR. ROSS: May I see it?
MR. ROSENBLATT: (Handing)
MR. ROSS: Do you have another copy?
MR. ROSENBLATT: No.
MR. ROSS: Show it to the witness.
MR. ROSENBLATT: I will.
Let me show you your signature.
THE WITNESS: Okay.

http://legacy.library.ucsf.edu/tid/wtf07a00/pdf
Suid/wtf07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

BY MR. ROSENBLATT:

Q. You recognize it?

A. My signature, yes.

Q. And you recognize the affidavit?

A. I do.

Q. Okay.

MR. ROSS: May I stand here since that's the only copy?

MR. ROSENBLATT: No problem.

Q. Now, on the first page of this affidavit, Dr. Spears, you said as follows:

I am generally familiar with the categories and subject matter of Lorillard documents that contain certain highly-proprietary and competitively-sensitive information. The confidential level two information, including documents containing highly-proprietary financial, marketing, and other business-planning information; research and product development information; and tobacco-product formulation, specification, and manufacturing information.

I am also generally familiar with Lorillard's policies regarding the safeguarding and disclosure of documents containing confidential level two information created or received by Lorillard.

My question to you is, that in terms of what

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

I just read in your affidavit from 1996, you are claiming privacy and secrecy on many more documents other than on the subject of additives, correct?

MR. ROSS: Objection, Your Honor. Totally beyond the scope, and argumentative question.

THE COURT: Yes. I'm not sure where you're going with that, Counsel.

MR. MOSS: Your Honor --

THE COURT: I mean, there's lots of things -- and we can talk about it sidebar if you want to.

(The following proceedings were had at sidebar:)

THE COURT: What I'm saying is there are lots of things in the running of a business, especially of the size and magnitude of this, that may be proprietary and secret and trade secrets and business protected.

So what? Now, where are we going with this?

MR. MOSS: Let me --

MR. ROSENBLATT: Well, the issue from my standpoint is I'm trying to establish that they claimed secrecy on documents which simply made them look bad, for which they had no basis.

THE COURT: Such as? What documents?

MR. ROSENBLATT: Well, that's what I want to find out from him.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suggested http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

MR. ROSS: This is a totally collateral matter.

THE COURT: You think, number one, he's going to tell you? Number two, what is the relevancy?

MR. MOSS: Well, the --

MR. ROSENBLATT: My next question was going to be that: You made the unilateral decision as to whether documents are sensitive and should even be revealed in litigation.

MR. ROSS: Well, it's not even this litigation. This is totally beyond the scope of cross. That's what you do every day in litigation. Has there been proceedings or rulings --

MR. ROSENBLATT: Documents are hardly outside.

MR. ROSS: We're off into another lawsuit.

MR. MOSS: There is even a more basic problem. This is a totally improper use -- he didn't ask him anything about the subject matter and attempts to use it. The only way he can use something like that is impeachment. But even going to the subject matter, that's a discovery dispute, Your Honor. What he's trying to do is bring this --

MR. ROSS: More fundamentally, I don't even know if there was a dispute.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: What are we talking about?

MR. ROSS: Right.

THE COURT: Sustain the objection. There is no question asked about it, and I think you're outside the scope anyway.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Yesterday you were talking about a Lorillard project called the Nicotine Augmentation Project, correct?

A. That's correct.

Q. Who decided on that name?

You may not know.

A. I don't know. I think somebody in research gave it that name.

Q. Okay. The word "augmentation" has a common meaning, correct? It means to increase?

A. Yes, I agree with that.

Q. Nothing mysterious about that?

A. Nothing mysterious.

Q. So if augmentation is used in the context of nicotine, you're talking about increasing nicotine?

A. That was the goal of the program.

Q. I want to ask you a question about

http://legacy.library.ucsf.edu/tid/wtf07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suid/wvt07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Plaintiffs' Exhibit 3220, dated February 13, 1980, from Richard E. Smith to you and two other people, a Mr. Flynn and a Mr. Ave, A-V-E?

A. Ave.

Q. Let me hand you the document, a copy of it. Who is Richard Smith?

A. He was in our marketing organization at the time.

Q. Okay. You got -- this memorandum went to you, and who is Flynn?

A. He was a -- I believe his title was director of market research or marketing research.

Q. And how about -- is it Ave?

A. Yes.

Q. Who is he or she?

A. It's a he, and he was either vice president or executive vice president for marketing and sales at this time. Yes, I think that's right. He would have been.

Q. Okay. The second paragraph -- this is a one-page document.

Goal: Determine the minimum level of nicotine that will allow continued smoking. We hypothesized that below some very low-nicotine level, diminished physiological satisfaction cannot be

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Substantial portions of www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

compensated for by psychological satisfaction. At this point, smokers will quit or return to higher-tar and -nicotine brands.

Do you agree with that?

A. It was a hypothesis at the time. He would say that I think smokers of the very low-tar, low-nicotine brands do either quit or find a cigarette that is more acceptable to them in terms of taste.

Q. Did you agree with the goal set forth in this memorandum, to determine the minimum level of nicotine that will allow continued smoking?

A. No, I don't -- don't agree with it, because I don't think such a number exists.

Q. Did you ever respond to this memorandum with a memorandum of your own?

A. I don't remember.

Q. Plaintiffs' Exhibit 3217, a memorandum dated November 9, 1976. The subject is Lowered Nicotine Project, from R.E. Smith to Dr. F.J. Schultz. This is a Lorillard memorandum, and it shows that -- a whole group of people received a copy of this memorandum, including you. (Handing)

Now, follow with me, if you would, the first paragraph:

After discussing the 50 percent

http://legacy.library.ucsf.edu/tid/wtf07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

lower-nicotine project with Dr. Spears, I agree that we should discontinue work. We all understand that this concept has considerable consumer trial appeal, as quantified in the NPSS concept study.

However, it is our judgment that a cigarette with substantially lowered nicotine could not deliver the smoking satisfaction to sustain consumer purchase.

Did you agree to discontinue this project?

A. I think at the time we either discontinued it or didn't start it. This is in the same time frame as the Nicotine Augmentation Project, which is where we put our energy.

Q. Now, when Mr. Smith makes the statement, I want to know if you're included in this judgment when he says: However, it is our judgment that a cigarette with substantially lowered nicotine could not deliver the smoking satisfaction to sustain consumer purchase.

Do you agree with that statement?

A. I agree with it if it's a low-tar cigarette. The nicotine is important to the taste of these cigarettes and their acceptance.

Q. That's what nicotine represents to you, taste?

A. I explained that yesterday, I thought, in terms of sensations in the oral cavity; a sensation of

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

fullness in terms of the smoke, strength. These are all sensations that I think are related to nicotine.

Q. Plaintiffs' Exhibit 3216, dated November 3, 1977 on Lorillard stationery. (Handing)

The first page, the last paragraph, where the heading is: To Quit Smoking: I don't know of any smoker who at some point hadn't wished he didn't smoke. If we could offer an acceptable alternative for providing nicotine, I am 100 percent sure that we would have a gigantic brand. The only trick is to price, size, formulate the product to produce the same margin per user as we now get from the average smoker.

Do you agree with the statement: I don't know of any smoker who at some point hadn't wished he didn't smoke?

A. No, I don't.

Q. Do you know who wrote this document?

A. Yes, I do.

Q. Who?

A. A marketing consultant to Lorillard who was charged with generating ideas that might be worthy of pursuit. He was not a Lorillard employee, and this was one of his suggestions, one of many.

Q. But he was hired by Lorillard to make suggestions?

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. That's correct. But Lorillard didn't accept many of his suggestions, including this one.

Q. And of course, marketing by definition is how to sell more of our product?

A. Well, in this instance, it was trying to identify new product opportunities.

Q. Plaintiffs' Exhibit 1580. This is a document dated February 19, 1968. The subject is: Meeting of Scientific Directors in February of 1968, and it has -- in Hilton Head, South Carolina, for a two and a half day meeting.

And it has the scientific directors of the American Tobacco Company, Brown & Williamson, R.J. Reynolds, Philip Morris, Liggett and Myers and Lorillard.

And you are, according to this document -- I'm sorry. I didn't give you a copy?

A. No, you didn't.

Q. Okay. (Handing)

And according to this document, you were there as the scientific representative for Lorillard, correct?

A. That's correct.

Q. Go to the third page of this document. It's hard for -- I don't know if it says two or three at the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

top. But the second paragraph begins with the words: We had considerable difficulty.

Are you there?

A. No. That's the second page.

Q. Okay. Go down to the second sentence of that paragraph, where it says: Even so, there were many areas of completely mutual interest which could be identified and a general feeling that an industry approach, as opposed to an individual company approach, was highly desirable.

Then it says: Mr. Harlow reserved final judgment.

Q. Is it fair to say that that statement means that the scientific directors were meeting -- looking for an industry approach which would have included all the companies, at least on certain subjects?

A. A coordinated research that was I guess of interest to all members of the industry, that was not antitrust in nature was discussed; and I don't know that we all agreed to that. But the writer of this memorandum put that in.

Q. Do you know who wrote this memorandum?

A. It says who wrote it on the front.

Q. Yes, it does. William --

A. W.W. Bates.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. And Bates was the scientific director for -- well, it was called at that time Liggett and Myers, correct?

A. That's correct.

Q. Plaintiffs' Exhibit 304. The date of this is November 17, 1978. It concerns a meeting in New York, November 15, 1978, and among those people present are -- you are present; Jim Bowling, senior vice president, corporate affairs, Philip Morris; Bob Seligman, vice president, research and development, Philip Morris; Tom Osdene, director of research, Philip Morris. (Handing)

MR. HEIM: Your Honor, can we have a copy of this document? We don't have one that's been --

MR. ROSENBLATT: I have a copy for the witness.

THE COURT: May I see which one they're talking about, please?

THE WITNESS: (Handing)

THE COURT: We can get one made up real quick. As a matter of fact, there are two of them here. Hold on.

MR. ROSENBLATT: Are there? Solves that.

MR. ROSS: PM 304.

THE COURT: Okay? Go ahead.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

BY MR. ROSENBLATT:

Q. Page 2 of this document, Dr. Spears, second paragraph -- and the Bill Shinn referred to is a lawyer for the law firm of Shook, Hardy & Bacon, correct?

A. That's correct. He was at the time.

Q. As a means of introduction, Bill Shinn described a history, particularly in relation to CTR. CTR began as an organization called Tobacco Industry Research Council. It was set up as an industry shield in 1954 and --

MR. ROSS: Your Honor, I'm sorry to interrupt, but I object to the scope. We had this discussion yesterday.

THE COURT: We can talk about it.

(The following proceedings were had at sidebar:)

MR. ROSS: Your Honor, let me point out first, this is not a Lorillard document.

MR. ROSENBLATT: Correct.

MR. ROSS: It's a document, I believe, of Philip Morris, and the reason I rose to object is counsel began reading something from this document about CTR. As we discussed yesterday, Dr. Spears never mentioned CTR or anything about it in his direct testimony. Now he's being asked about some other

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Substantial portions of www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

company's document talking about CTR.

THE COURT: I'm not sure where he's going. This is already in evidence, I take it?

MR. ROSENBLATT: Yes.

THE COURT: What is the thrust of this? A CTR thrust or some other kind of a thrust?

MR. ROSENBLATT: Well, he's present at this meeting as vice president of Lorillard.

THE COURT: Uh-huh.

MR. ROSENBLATT: This is the document where that word "front" came up. He was on the board of directors. And they're involved in health research. He's testified about health research, and I want to ask him was it a front and what does the word "front" mean to you.

MR. ROSS: Well, okay. I will repeat my objection, then, that it's clearly beyond the scope of his direct. As we talked yesterday, Dr. Spears was asked in his deposition questions about CTR, which was played to the jury during plaintiffs' case. The subject of CTR never came up in the course of his direct examination here, and as Your Honor ruled yesterday, that's beyond the scope. And now he's being asked to interpret some other company's document.

MR. MOODHE: It's not as if this is the first

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

time Mr. Rosenblatt has had a crack at this document with a witness. He extensively examined Dr. McAllister about this document.

MR. ROSENBLATT: But I don't think this witness is going to agree with Dr. McAllister that the word "front" means "can you front me a quarter for Metrorail?" I think he's going to have a completely different answer.

MS. ROSENBLATT: You know, also, Judge, he testified on direct that research was done through outside organizations.

THE COURT: Yes.

MS. ROSENBLATT: So CTR is an outside organization that did research.

THE COURT: But this isn't --

MR. ROSS: He clearly was not talking about CTR.

THE COURT: Talking about the research that was done through an outside organization vis-a-vis -- by CTR, that might be a different story. We're not talking about that now; we're talking about some policy statements and --

MS. ROSENBLATT: Well, if Stanley lays a predicate that CTR was one of those organizations, can't he say that: It really is true that it was more

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

of a front, do you agree or disagree? I mean, this is in evidence. He has to lay a predicate.

THE COURT: I think he has to lay more of a predicate than he's already laid.

MR. ROSS: Your Honor, that was not the subject of his direct. He identified what he was talking about. He talked about Lorillard specific funded research at Ohio State University and never talked about Council for Tobacco Research.

THE COURT: If the Council for Tobacco Research did in fact do some of their research, that's a different story. You know, we open a whole Pandora's box here about CTR.

MR. ROSS: That's right.

THE COURT: But that's not the thrust of what he's talking about.

MR. ROSS: And he's talking about --

THE COURT: I will sustain the objection as to this. The document speaks for itself, in any event.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Dr. Spears, you testified yesterday about -- you mentioned the number of people Lorillard employs, and the market share of your company and the number of

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

billions of cigarettes sold.

Isn't it true that the base of Lorillard's business is the high school student?

A. No.

Q. Well, let me show you Plaintiffs' Exhibit 266, which is a Lorillard document from T.L. Achey. A-C-H-E-Y, to Mr. Curtis Judge. Now, Curtis Judge --

MR. ROSS: Your Honor, I think we need to go sidebar. It's duplicative and beyond the scope.

THE COURT: Okay.

(The following proceedings were had at sidebar:)

MR. ROSS: This is pretty simple, Your Honor. This is a question about youth marketing, which -- he never discussed marketing at all.

And, Your Honor, we talked about this yesterday. This very document was shown to Dr. Spears in his deposition. I can point to you the transcript. The questions were asked. He asked about the very statement, the base of your business. He asked him what this meant. All of that was played to the jury.

THE COURT: This was on the deposition?

MR. ROSS: On the video that was played to the jury. Totally. I can show Your Honor exactly what was asked and where it is.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: Did you? I don't know.

MR. ROSS: 20817.

Here it is. I'm going to hand you a document. This is the transcript.

THE COURT: The transcript.

MR. ROSENBLATT: This is the trial transcript, David?

MR. ROSS: This is the trial transcript.

THE COURT: January 25, 1999. Volume 188, Page 20817.

And I'm going to hand you a document dated -- it's the Achey report. Who is Achey? Achey is who? Carrying over to the next page, look at the third paragraph of the first page. Is that what you're looking at?

MR. ROSENBLATT: Yes.

THE COURT: It says you read it to him -- yes. You asked him the question, asked and answered.

MR. ROSS: Right there and this is as played.

THE COURT: Question: Does that not mean that most of the people smoking Newport are high school kids?

Answer: No, I don't interpret it to mean that.

And you say: What do you interpret it to

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

mean?

MR. ROSENBLATT: I was not aware of that.

THE COURT: Okay.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Moving right along, the next document, Dr. Spears, is Plaintiffs' Exhibit 5199, and this I know is something you're familiar with, because it's an article that you wrote. (Handing)

This article that you wrote, Dr. Spears, is titled: Factors Affecting Smoke Delivery of Nicotine and Carbon Monoxide.

What year did you write this?

A. 1975.

Q. It's a very -- I mean, to your fellow chemists it may not be overly technical, but it's -- to anyone outside your field, it's a highly technical article, and you've got diagrams.

Go to Page 13, which is the second page of your article.

The first paragraph on that page: Generally speaking -- you're with me?

A. Yes.

Q. And these of course are your words:

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Generally speaking, the nicotine yield of a cigarette is determined by the nicotine content of the tobacco. The static bum rate or amount of tobacco consumed during puffing, the pressure drop of the tobacco column, porosity of the wrapper and/or ventilation of the filter, the pressure drop of the filter, the filter material, the surface area of the filter material, and the affinity of the filter material for nicotine, particularly as a function of smoke pH, through the combination of these variables, plant genetics and special processes to remove nicotine from tobacco, it is possible to manipulate the yield of nicotine from about .1 milligrams to 4 milligrams per cigarette.

That was true in 1975?

A. This article was a part of a symposium that I was invited to present on particularly nicotine and carbon monoxide at the University of Kentucky; and the task that I undertook was to describe the maximum differences that one could create through all of these techniques in the smoke yield of nicotine when smoked by machine for nicotine.

And that's what this says, and this is -- what you read indicates these are all the different parameters that could affect nicotine yield in a cigarette.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Submitted to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

And that's as true today as it was then.

Q. But you were saying that you -- the tobacco companies do have the ability to manipulate the yield of nicotine from about .1 milligrams to 4 milligrams per cigarette?

A. Not at that time. For example, I refer to genetics being used to grow tobacco with low nicotine. That was not commercially available. But if you use plant genetics and develop those type of products, you could conceivably get down to this .1 milligram.

Q. Now, do I understand that .1 milligram is one-tenth of one milligram?

A. That's correct.

Q. Go to the last sentence of the article on Page 18, where you say: Manipulation of the amount of tobacco burned and manipulation of the puff volume at the cone surface by ventilation can produce practical variations in carbon monoxide yield from about 5 milligrams to 25 milligrams per cigarette.

That was a true statement back then?

A. Yes.

Q. True today?

A. I think it would be, yes.

Q. The next document I want to ask you some questions about is Plaintiffs' Exhibit 3138. The title

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

of this is: SHF Cigarette Marketplace, Opportunities, Search and Situation Analysis, Volume 2, Management Report. (Handing)

Would you please go to Page 7 of this document? The title is: Low-Tar and -Nicotine Cigarettes.

Number 2: Most smokers, however, do not really understand what tar and nicotine are, or the difference between the two. Tar and nicotine is a term commonly used as a single word.

Do you think that most smokers really understand the distinctions between tar and nicotine and what tar is and what nicotine is and the effect of each?

A. I've never gone out and surveyed personally smokers with respect to their knowledge of these two terms; but I think both tar and nicotine have been commonly advertised in the advertisements.

So -- and they frequently -- I mean, they always go together in the advertising. So I think people would associate the two because of that. But beyond that, I can't say what their understanding is of these terms.

Q. Go to the last sentence on Page 7 where this statement is made: Those who smoke low-tar

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Submitted to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

and -nicotine cigarettes generally do so because they believe such cigarettes are, quote "better for you," end quote.

Is that a statement you agree with or disagree with?

A. I don't know. As I said, I have no information other than these kind of surveys where people have been asked questions. The responses you get depend upon exactly how you ask the question, and of course who you ask. And I don't know any of these things with respect to this particular document.

Q. But you've told us, as a 40-year employee of Lorillard and presently chairman of the board and someone with a Ph.D. in chemistry, who has done a lot of research and studying in these areas, you've told us that it's logical from your standpoint, wearing both hats, the hat as a Ph.D. in chemistry and the hat as the chairman of the board of Lorillard, that it's logical to assume that low tar is less hazardous?

A. I said that, yes. But that's not your question.

Q. It's not? I thought it was.

A. I think your question is, those who smoke low tar and nicotine, generally do they believe such cigarettes are better for you? I don't know that

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suid/wvt07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

that's what they believe.

Q. That was an earlier question.

I want to ask you about a Lorillard memorandum from you to Mr. C.H. Judge, dated June 4, 1974, Plaintiffs' Exhibit 3222.

Who is or was Mr. C.H. Judge?

A. He was the president of Lorillard at the time.

MR. ROSS: What was the number of that one again?

MR. ROSENBLATT: 3222.

MR. ROSS: I think it may have a different number. Let me see if this is the document you're talking about. Yes.

Okay. The confusion here, Your Honor, is this document is in evidence as 259, according to our records, and we will have the same duplicative problem again.

THE COURT: Okay. So if it's a duplicate of 259 --

MR. ROSS: No. The duplicative problem that we've discussed at sidebar.

THE COURT: Oh, that type problem.

MR. ROSENBLATT: If counsel is saying that this was testimony that -- this was addressed in the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

video deposition shown to the jury, I'll --

MR. ROSS: It was.

MR. ROSENBLATT: Is that what you're representing?

MR. ROSS: I will represent that it was.

MR. ROSENBLATT: Okay.

THE COURT: Okay.

BY MR. ROSENBLATT:

Q. Plaintiffs' Exhibit Number 3215, Lorillard Research Center in Greensboro, Annual Review, Research Department, 1976. The date of this document is February 14, 1978.

Your name appears on the front page. I interpret it as simply meaning you received a copy of this. (Handing)

And you certainly would have expected to have received a copy of it, right?

A. Yes. I'm shown under "copies."

Q. Go to Page 3 of the document, please. The title is: Review of Technical Activities, and then the heading under that is: Nicotine Augmented Cigarettes.

Starting with the second sentence: It was felt that the trend toward even lower-tar values would reduce the nicotine delivery to very low levels. Hence, in order to satisfy the nicotine requirements of

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

the smoker, the nicotine level needed to be maintained at no lower than 0.4 milligrams per cigarette.

When someone in a technical document refers to satisfying the nicotine requirements of the smoker, what do you take that to mean?

A. I don't know unless they are -- unless they say it in more detail than this.

Q. Well, I mean the word "require" has a common meaning.

A. To satisfy something, I don't know what that means, what requirements we're talking about.

Q. Okay.

A. To my knowledge, you know, individual investigators, individuals who write reports, sometimes use words that are not exactly the right words to be used in describing exactly what they mean.

Q. Go to the last paragraph on Page 3, at the bottom of the page:

One point of view is that the physiological needs of the smoker could be met by increasing the ratio of free nicotine to total nicotine, while maintaining a relatively low total nicotine level. This can be brought about by raising the smoke pH.

Do you agree or disagree?

A. I think it was speculation on the part of the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Submitted to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

authors at that time.

Q. Well, true or not true? This could be brought about by raising the smoke pH?

A. I do not believe that that's true.

Q. Go to Page 4, the bottom paragraph: In the same sense that ammonia was found to be necessary to release nicotine from tobacco in the Freon extraction experiments, it was thought that ammonia added to cigarette tobacco should increase the nicotine concentration in the smoke, or at least increase the amount of free nicotine by virtue of an increased smoke pH.

I mean, isn't this document saying that the way to get more free nicotine is to increase the smoke pH?

A. What this document is saying is here are some postulates that the authors are putting forward. They really don't know whether they are right or wrong, but they're arguing in the way they write this, that they believe that would be an approach.

Q. But that's their postulate: You want more free nicotine, you raise the pH?

A. That was their postulate; not necessarily a correct postulate.

Q. Plaintiffs' Exhibit , L cillard Research

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Center in Greensboro, the heading is: PH of Smoke: A Review. The date is July 12, 1976. Let me give you a copy. (Handing)

Go to Page 10, please. Again, this is a very technical document with a lot of graphs. The last paragraph on Page 10, Dr. Spears, the author of this document says as follows:

It is evident from this graph that as the pH increases, the amount of freebase nicotine increases.

So that's the same postulate as was expressed in the previous document?

A. It's a statement, but I think it's not in context of this whole document. This whole document is -- number one, it describes the various methods that have been used to try to measure pH.

Smoke aerosol is not a system that allows you to measure pH. PH is a term that's applied to solutions, aqueous solutions, in which there are acids or bases, and we can measure pH; but smoke aerosol is not an aqueous system, and no one really knows what pH measured here really means. And the author points that out, that each method of measurement gives a different result.

What you just read relates to if this were an aqueous situation, this would be what you would find.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

But as I say, cigarette smoke is not an aqueous solution, and the pH of cigarette smoke can be measured in various ways. But it all involves putting it in water and making some sort of a measurement.

If you measure the pH of whole smoke, by putting everything that you get from the cigarette in water and making the measurements, this equation would not apply. It is basically an acidic environment.

Q. Go to Page 11, the heading: Taste and Flavor, and about the third sentence in, where the author of this document says:

Investigators have felt that an increase in the pH of smoke resulted in a greater physiological (throat and chest) impact and toxicity. This has been attributed to the increase in the amount of freebase nicotine with increased pH.

Well, whether this author is right or wrong, apparently what he's saying here is again the relationship between higher pH and increased free nicotine, nicotine in its free-base form?

A. Yes. It's referencing the work of Armitage, and Armitage did do some work on absorption and nicotine in the oral, in the mouth. And he compared smoke from cigarettes and smoke from cigars. And smoke from cigars is much more alkaline, if you dissolve it

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supplied by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

in water, than cigarettes; and he found that nicotine was more quickly absorbed in the oral cavity at the higher pHs.

This, however, is not the situation with respect to cigarette smoke, which is inhaled for the most part, and relatively little is absorbed in the oral cavity.

So, many of these statements that he's making are based on oral cavity absorption and do not relate to cigarette smoking.

Q. Why would he be talking about it in a tobacco document?

A. Because he thought it might -- he thought it may relate to inhalation. But, in my judgment, he's incorrect.

Q. Go to the bottom of Page 11 where, according to the brand -- the two brands, according to this chart, that have the highest pH are Marlboro and Kool, correct?

A. For this particular measurement of pH, which is collection of the particulate matter on a filter pad, and then solution of in water and a pH measurement, he reports that, I guess, Kool and Marlboro have the higher pH in that kind of a measurement than do the other products listed.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Substantial portions of www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. And the author of this document, in the very last sentence on Page 11, makes the following statement:

The market leaders -- which means the best selling cigarettes, right, in this content?

A. I think that's what he meant.

Q. Okay. The market leaders appear to have the higher pHs, and hence the higher concentration of freebase nicotine.

A. Is that what -- that's what it says, yes.

Q. You don't agree with it?

A. No.

Q. Okay.

A. Because he only lists one, two, three, four, five cigarettes, and in the marketplace there are probably 350 different products.

If you look at all 350, you would certainly not conclude that this measurement of pH reflects only the market leaders.

Q. Now, you know, from my standpoint -- and correct me if I'm wrong -- PH of Smoke: A Review, this appears to be a scholarly article where -- there's a bibliography where this author is citing some 46 references at the end.

In other words, this would mean that the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supplied by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

author of this article looked at or read or reviewed these 46 articles and made them his references, correct?

A. Yes, I would say so. And he includes in his writings his interpretation of what these articles say.

Q. And some of the references are to your work?

A. I would have to look.

Q. Yeah, Number 45: Spears: Factors Affecting Smoke Delivery of Nicotine and Carbon Monoxide, Internal Lorillard Report, 1975.

A. Yes.

Q. 41 is talking about you again: Definition of a Cigar, Internal Lorillard Report, 1975.

Plaintiffs' Exhibit 3080. Lorillard Research Center, the subject of this document is: PH of Particulate Phase. The date is February 8, 1973. It's indicated that you, among several other people, are receiving a copy of this document. (Handing)

And on the first page of the document, where its subject is: PH and Particulate Phase, in the first paragraph toward the bottom, it says: For example, a change in pH from 5.7 to 8.0 results in an increase of free nicotine from 0.69 percent to 58.3 percent.

Again, standing for the proposition that when the pH is increased, the free nicotine greatly

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suid/wvt07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

increases?

A. Again, that is correct in water. It is not correct in smoke aerosol.

Q. Well, this author and the previous authors did not make the distinction you're making, correct?

A. They've all made the same error in quoting common acid-based theory, which is in aqueous solutions. If you're talking about a water solution, what they say is exactly correct.

But, again, that is not a smoke aerosol, which is basically no water in it with respect to this kind of a measurement.

Q. And you go down to the end of that first paragraph, where this author says:

Furthermore, the cigarette brands, which are enjoying the largest sales increase, generally have smoke pHs in the 6.5 to 7.0 range.

That's what he says, correct?

A. I'm sorry, I missed where that -- where you're reading from.

Q. Same page. You know, there's that little formula?

A. Yes.

Q. And then the last sentence still in that first paragraph: Furthermore?

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. Yes. I think it's quoting the same data that you had in the other paper, or something very similar to it.

Q. Okay. And then on Page 7, the third paragraph, this author says:

The smoke pH for Kool and Marlboro are 7.12 and 6.98, respectively, confirming the relationship between high smoke pH and cigarette sales increase.

A. Yes.

Q. So here is another author, in your view, who attributes the high sales of Kool and Marlboro to the high smoke pH and the high amount of free nicotine in those two brands?

A. Yes. These two numbers are identical to the numbers in the other document that we just looked at. I think he's quoting exactly from -- one or the other is quoting from the same data, same set of data. Same conclusions are being shared between these two investigators.

Q. The good news is that this may be my last document.

Plaintiffs' Exhibit 59 -- and this is a letter to you from Bob Seligman, vice president of research and development at Philip Morris, dated March 31, 1980. (Handing)

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

It's a short letter which says as follows:

Dear Alex: Mr. J.C. Bowling of our New York office asked that I send you our recommendations for industry research, which we prepared last year. To that end, you will find attached a list entitled: Potential Long-Term Scientific Studies, which Dr. Osdene and I generated early last year. Additionally, I have added a list of three subjects which I feel should be avoided.

And isn't it true that these three subjects, which Seligman, as the vice president of research and development, felt should be avoided; felt that they should be avoided because there was a likelihood that the results of that kind of research would have a negative, adverse impact on the financial health of the tobacco companies?

A. No. I believe your conclusion is 180 degrees out of phase with what the meaning of this is.

It says: We should avoid developing new tests for carcinogenicity. And of course these are animal tests, other than inhalation.

That is a subject that had been researched considerably. People looked at tissue culture methods. There are a whole array of mutagenic methods, and there just doesn't seem to be much reason to go into that

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

field in terms of being able to create information that will be helpful in the field of cancer research.

And attempts to relate human disease to smoking -- again, this is epidemiological studies. Many epidemiological studies had been done. There was no real reason to carry out more epidemiological studies which show an association with smoking --

Q. Doctor, Doctor --

A. Yes.

MR. ROSS: Your Honor --

MR. MOSS: Your Honor --

THE COURT: Let's finish the answer.

MR. ROSENBLATT: Sorry.

A. (Continuing) Then the final one is conduct experiments which require large doses of carcinogen to show added effects of smoking. And I had put a note in here, I guess, when I received this, this meant implantation. And again, I believe these are not relevant kinds of assays that would be useful.

Now, if you look at the second page, it relates to things that they thought were worth doing. And that includes validation of new short-term bioassays versus long-term skin painting and inhalation. That seems quite meritorious, and not consistent with your hypothesis.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Correlation between skin painting and inhalation is certainly a valid area to look at. And if you could get results of inhalation, it would certainly make a major contribution to this field.

The effect of environmental and other factors in skin painting and inhalation, perfectly reasonable things to do, and very germane, and certainly conceivably the results would not be helpful to the industry, as you point out.

Q. Are you done?

A. No. I would like to go through the whole list.

MR. ROSENBLATT: Well, Your Honor --

THE WITNESS: There is a very long list of things that they do propose to do.

THE COURT: Let me see the document so I see what we're talking about.

THE WITNESS: (Handing)

THE COURT: Then I'll go back to the question.

Hold on, one second, folks.

Did you get the last question?

THE WITNESS: The question was, doesn't this show that the industry was trying to avoid showing research that would have an adverse outcome to their

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

interest. And that's not what this document shows.

MR. ROSENBLATT: And my position is he's way -- he's answered the question. He's way beyond it.

MR. MOSS: Your Honor --

THE COURT: Let's talk sidebar, folks. I think I found it.

(The following proceedings were had at sidebar:)

MR. HEIM: Judge, do you want to take the morning break while we're doing that?

MR. ROSENBLATT: I'm for that.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: Okay. Somebody suggested a break. That might be a good idea.

(The jurors exited the courtroom.)

THE COURT: Have a seat, folks. We'll be at ease. If you would be kind enough to step outside, Doctor, I would appreciate it.

(The witness exited the courtroom.)

(The following proceedings were had at sidebar:)

THE COURT: Okay. In reading the document itself, it says there is a list; send you recommendations; you'll find the attached list entitled

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Potential Long-Term Scientific Studies. Isn't it true that these, these three subjects which Seligman as the vice president thought should be avoided or what -- have a negative, adverse effect.

I don't understand that, because you mentioned three, and you don't say which ones they are. There is a whole list of more.

MR. ROSENBLATT: I was going to get to them. He's still answering -- in my view not answering my question.

THE COURT: He says: No, I believe your conclusion is 180 degrees out of phase.

Then he wants to talk about these.

MR. HEIM: He wants to explain why that is not the case.

THE COURT: I understand that. But I think he ought to finish his question. If he wants to focus in on three particular --

MR. ROSENBLATT: I never got to mention the three.

MR. MOSS: The answer mentions them.

MR. ROSS: Dr. Spears read in the three.

THE COURT: It says: We should --

MR. ROSS: You don't have the last page, Your Honor.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: It says: These of course are animal tests.

MR. ROSS: You don't have the whole document.

MR. ROSENBLATT: I think it's here, Judge. You do have the last page. These are the subjects to avoid. And this is what he's on now, which is testimony.

MR. ROSS: He asked Dr. Spears, and Dr. Spears read the three. So they've been read to the jury. Dr. Spears read them right there.

THE COURT: Here. Is this what you're talking about?

MR. ROSS: Right.

THE COURT: He talks about that. But now he wants to go through the whole list. You didn't ask him about the list.

MR. ROSS: It explains why -- he is explaining why Mr. Rosenblatt's question which -- this is my interpretation: Isn't that what this document says?

And he's saying: No, because you've read these last three things, and you have to look at the whole document, and this is what the document says.

He's not saying avoid things that have an adverse impact on the financial health of the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

companies, because he's saying do all these things. And what Dr. Spears was saying, before he was cut off, was a lot of the results of these tests could have adverse impacts.

THE COURT: Let me see what else he's saying.

Then he starts his answer -- I thought he was finished.

MR. ROSS: As a matter of fact, he cut him off before he even started talking about the three.

THE COURT: I thought he was talking about the three subjects?

MR. ROSS: He was.

THE COURT: He says the final ones conducted --

MR. HEIM: That's the final one of the three.

THE COURT: Then he says: Look at the second page.

MR. ROSENBLATT: Here is the advocacy piece.

MR. ROSS: If you put a document in front of a witness and say: Isn't this what this means --

MR. ROSENBLATT: Stop it.

MR. ROSS: He says: Look at this here.

THE COURT: I'm not certain they relate.

MR. ROSS: Absolutely they do, Your Honor.

THE COURT: These are long-term scientific

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suggested http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

studies, but what we ought to do is avoid the three.

MR. ROSENBLATT: That's my three.

THE COURT: That's all that's necessary. You could come back later, I suppose, and ask him about the other stuff. But he's volunteering information not part of the question. Because the question is: Of these three, why should we avoid these three, okay?

And that's what they're talking about. So I'll sustain plaintiffs' objection to your objection, and --

MR. ROSENBLATT: I'll start with a new question. I'll get back.

THE COURT: Okay. We've got so many things to talk about. What is the situation now? How much longer do you think you're going to be?

MR. ROSENBLATT: I think I can certainly finish before lunch.

THE COURT: But you've got some redirect?

MR. ROSS: It will be extremely short.

MR. HEIM: Don't be so sure.

THE COURT: You think that we're going to have the whole afternoon to take up some matters other than --

MR. HEIM: Well, it depends on how Your Honor rules. If Your Honor permits us to do these

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

depositions -- and there is an important aspect to it -- then we're going to read depositions for a couple of hours. If Your Honor doesn't, it's just going to --

THE COURT: How am I going to know until I hear the arguments?

MR. HEIM: What I expect we'll do, let's assume we finish about 12:15. That sounds about right to me, based on what we're saying. I gather what Your Honor might decide to do is hear the arguments --

THE COURT: I won't release the jury until I know for sure what I'm going to do.

MR. HEIM: -- hear the arguments for 15 minutes.

THE COURT: I was under the impression the arguments were going --

MR. HEIM: No. The arguments won't take long at all. You'll know whether to send them home or not.

THE COURT: I misunderstood. I thought you were going to have two hours of argument.

MR. HEIM: Gosh, no.

THE COURT: Plus her argument.

MR. HEIM: Now they're up to two hours.

MR. ROSENBLATT: Are they going to let her argue?

MS. ROSENBLATT: Probably not.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: When we're finished with the witness totally, we'll take this up.

MS. ROSENBLATT: As a practical matter, Your Honor, since there are cross-designations, and of course --

THE COURT: Once we make a determination, we have another problem.

MS. ROSENBLATT: I don't think as a practical matter there's going to be an opportunity to have anything in terms of read -- we'll cross that bridge when we get to it.

THE COURT: Stranger things have happened.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: We'll take a break.

(A brief recess was taken.)

THE COURT: Okay. Now, let's bring the doctor in and the jury.

THE BAILIFF: Yes, Your Honor.

(The witness entered the courtroom.)

THE BAILIFF: Bringing in the jury.

(The jurors entered the courtroom.)

THE COURT: All right. Be seated, folks. Let's resume.

BY MR. ROSENBLATT:

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. Now, Dr. Spears, getting back to my question on this document, Plaintiffs' Exhibit 59, where Robert Seligman says in his letter to you: I have added a list of three subjects which I feel should be avoided. And then there's a separate page, the title of which is: Subjects to be Avoided.

And one of those subjects is: Attempt to Relate Human Disease to Smoking.

Could there be any more relevant area of research, to a smoker concerned about his health, than the relationship between smoking and human disease? And isn't it a fact that The Frank Statement 45 years ago promised the American people that that was precisely the area they were going to research, the relationship between smoking and human disease?

A. Well, as I explained to you earlier, this to me means epidemiological studies, because that is the only way to relate it to human disease. And the epidemiological studies had already been conducted, many, many of them.

Q. Had -- oh, I'm sorry.

A. And I think he was saying: Let's don't spend any more money doing work that simply associates a disease with smoking.

Q. You don't think he was concerned about more

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Substantial portions www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

findings of causation; that cigarette smoking -- more scientists finding that cigarette smoking causes cancer than other diseases, and that would hurt the tobacco companies?

You don't think that was in his mind when he listed this as a subject to be avoided?

A. No, I don't.

Q. Okay.

A. I think it's exactly as I described it.

Q. Okay. Has anyone in the tobacco industry -- has Lorillard ever conducted epidemiological research?

A. No. Lorillard, as a company, has not conducted epidemiological research.

Q. So what would be the point in saying --

A. We have supported -- we have supported that kind of research.

Q. Okay.

Let me go to an article that is your article, the title of which is: Chemical and Physical Criteria for Tobacco Leaf of Modern-Day Cigarettes.

MR. ROSS: Do you have an exhibit number?

MR. ROSENBLATT: 691. (Handing to witness)

It's got a jagged edge back here, so be careful.

BY MR. ROSENBLATT:

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. You recognize that as your article, Dr. Spears?

A. Yes, I do.

Q. What you say in the opening sentence is: New cigarette brand introductions and brand extensions have resulted in significant changes in the average product sold over the last five years.

Go to Page 22 of your article, the last couple of sentences before the heading: Cigarette Blend Composition.

You are saying in this article: Based on these trends, one would conclude that the lowest-tar segment is composed of cigarettes utilizing a tobacco blend which is significantly higher in nicotine. Although one cannot conclude that this has been achieved solely by the selection of tobacco, it does indicate a trend toward the use of tobacco with higher nicotine levels.

You go on to say: In addition to this trend toward higher nicotine levels, as shown through analysis of market and product statistics, we can look at trends in the use of tobacco type as compiled from government statistics.

Now, go to the bottom of Page 23, where you say: In order to have some additional insight into the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

possible tobacco-type trends that may result from the 0 to 6 milligram tar category, we can examine the ways in which the higher nicotine levels can be achieved.

Table 5 shows an average analysis for the three main types of tobacco: flue-cured, Burley and Oriental; and for stem and tobacco sheet. These represent the components from which the composite blend may be formulated.

Higher nicotine levels can be achieved by decreasing Oriental and the stem and tobacco sheet, and increasing the Burley and upper-stalk positions of both the flue-cured and Burley tobacco.

Now, in terms of what I've read so far, in part you're talking about how you can raise the nicotine level of a cigarette through the blending of different kinds of tobacco, correct?

A. That is a question?

Q. Yes. Correct.

A. We're talking about the tobacco, percentage of nicotine in the tobacco, not smoke. Nicotine in tobacco. Percentage of nicotine in the tobacco blend.

Q. Be that as it may, my question is: Are you not discussing, in this article, ways of increasing the level of nicotine in a cigarette by the manner in which you blend various kinds of tobacco?

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suid/wvt07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. I don't think I'm doing -- I'm discussing it the way you have just stated. It is being discussed as with respect to the tobacco in the cigarettes, and the nicotine level in the tobacco.

It's not being discussed with respect to nicotine in the smoke, which I think the way you phrase it implies.

Q. Well, isn't it a fact, Dr. Spears, that everyone has apparently made the same misinterpretation as I have, when they compare your testimony before Congress and this article?

MR. ROSS: Objection, Your Honor. We're going right back to where we were.

MR. ROSENBLATT: Hardly.

THE COURT: I think we better talk about it before the question is asked.

MR. ROSENBLATT: Hardly.

(The following proceedings were had at sidebar:)

THE COURT: I want to know what the question is going to be.

MR. ROSENBLATT: Well, he said, in fact, I'm misunderstanding his article.

My question to him is: Well, everyone has misunderstood your article. Waxman misunderstood --

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

I'm not going to use the word "lie." I'm going to say: Waxman misunderstood it, the reporter from the New York Times misunderstood it, and they misunderstood it the way -- to obviously cast -- you know, he's saying it seems clear to Waxman, Hilts and me what he's saying. He's saying: No, I'm saying something else.

THE COURT: I'm still confused about that. Because if I listen to what he wrote and what he says now, that what he's saying -- and the question that you asked was that they did talk about the blending of the tobacco, therefore the amount of nicotine which would be in the tobacco within the confines of a cigarette, that's fine. He's not talking about a lit cigarette and a burning cigarette --

MR. ROSS: Right.

THE COURT: -- and the cigarette smoke.

Now, I'm not confused on that because that's what he's saying.

I think if what you now want to find out is that by having done that and now increasing the nicotine level of the tobacco in the cigarette, the next question that follows is: Well, when you light the cigarette and you burn it and you reduce it down to smoke, does that also increase the nicotine?

And if the answer of that is yes it does,

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

that's one thing.

If he can explain to you why, even if the amount of nicotine in an unburnt cigarette is reduced by burning, then he could explain that. I don't know.

I mean, that's where I think we're going.

MR. ROSS: And Your Honor -- Your Honor has it exactly right. Your Honor --

THE COURT: You would say that.

MR. ROSS: Your Honor has not been confused. And the fact that Congressman Waxman and a reporter got confused is, what, Your Honor has said now, five times. He can't ask him that.

THE COURT: I think under the circumstances -- his statement is very explicit in what he's saying. He's saying: Yes, the tobacco within the cigarette has a difference of blends; the amount of nicotine within the blend of tobacco is increased or decreased, or we can make it what we want.

There has to be follow-up.

MR. MOSS: But the problem -- you're exactly right. But that would be -- that's not what Mr. Rosenblatt is trying to get at.

THE COURT: I know it.

MR. MOSS: We're back to this very improper question that he's asking again.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: Yes. I don't want to get into what Waxman may have thought or anyone else. You have to establish this base first.

MR. ROSENBLATT: I don't want to ask him that question. I want to ask him -- I don't want to ask him your question. Your question is great for a seminar. Because I know what he's going to say.

THE COURT: Then don't ask him.

MR. ROSENBLATT: Of course not.

THE COURT: Move on.

MR. MOSS: The problem is, Your Honor -- I don't mean to revisit it -- but yesterday we were there; you let all of us know what we're not supposed to do.

Now, instead of -- that's right.

THE COURT: Don't start. Don't start. I kicked you out the back door yesterday.

MR. ROSS: I'm going to get over here.

THE COURT: I'm only kidding.

MR. MOSS: The point is, now he's making -- I forgot exactly the question, but the question leaves the impression with the jury that everyone thinks you're full of baloney except you, and that was the problem we had yesterday, but only a difference in gradation today, and that jury needs to be instructed

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

once again.

THE COURT: Mr. Ross does have redirect.

MR. MOSS: I understand that. But on redirect, it's unfair for us to have to go into why were other people confused. That jury ought to be --

THE COURT: I can only tell them to disregard the last question.

MR. MOSS: I request that. That's all I'm asking.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: The jury will disregard the last question.

BY MR. ROSENBLATT:

Q. Okay. Dr. Spears, Page 24 of your article we we're discussing -- and by the way, you obviously identified yourself as being with Lorillard, a Division of Loews Theaters, at the time you wrote this article, correct?

A. Yes. Yes.

Q. So Page 24, the second sentence: Higher nicotine levels can be achieved by decreasing Oriental and the stem and tobacco sheet, and increasing the Burley and upper-stalk positions of both the flue-cured and the Burley tobacco.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

From your standpoint, that was a true statement then and it's a true statement today?

A. That's correct. Bear in mind, we're talking about tobacco.

Q. Well, I didn't think we were talking about chopped liver.

A. Well, you may have thought we were talking about smoke.

THE COURT: Next question. Next question.

BY MR. ROSENBLATT:

Q. Page 37: Summary -- and these of course are yours words. You could have written anything you wanted. And these are your words.

Summary, Page 37, and you say: In summary, the physical and chemical characteristics of the tobacco in today's cigarettes are undergoing some change. Nicotine will increase if the very low-tar brands continue to expand in market share.

Have I read that correctly?

A. You have.

Q. And the very low-tar brands, from the date you wrote this article, have in fact expanded in market share, correct?

A. Not a great deal.

Q. But some?

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Stanford Library http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. I can't be quantitative about it.

They've been rather stable in the small-share market.

Q. That would be -- this article was written in what year?

A. I think it was written in the early '80s.

Q. Okay. And the statement you put in there: Nicotine will increase if the very low-tar brands continue to expand in market share, you felt that was true then and you feel it's true today?

A. Nicotine in tobacco as a sales-weighted average will increase.

MR. ROSENBLATT: That's all I have.

THE COURT: Redirect?

MR. ROSS: Just one second, Your Honor.

REDIRECT EXAMINATION

BY MR. ROSS:

Q. Just a very few brief questions for you.

The article that we were just talking about at the end of the cross examination, you stated in response to one of Mr. Rosenblatt's questions that, "we're talking about the nicotine in the tobacco," when you make the statement that nicotine will increase in the very low-tar cigarettes, correct?

A. That's correct.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Supported by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Q. Explain what you meant by that.

A. Well, first of all, let me read the title of the article: Chemical and Physical Criteria for Tobacco Leaf of Modern-Day Cigarettes, and the whole article deals with tobacco and tobacco leaves.

And what was the question?

Q. I asked you to explain it, but let me ask you more directly.

In this article, are you talking about nicotine level in the smoke that the smoker inhales after the cigarette is lit?

A. No.

Q. And explain the difference, please, to the jury.

A. We're talking about -- this article deals with changes to be expected in tobacco blends over time. And the finding or the report in this article says that for very low-tar-type of cigarettes, the tobacco blends had a higher level of nicotine. And if that segment of the market increased, then there would be a trend to using higher levels of nicotine overall.

Those are the conclusions of the article.

Now, the only thing in here related to cigarette smoke is that I divided the market, the cigarettes in the marketplace, into three categories,

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

the lowest category being 0 to 6 milligrams tar. And that was the category I was talking about that the tobacco nicotine was increasing.

Q. So, Dr. Spears, in the low-tar cigarettes, is the level of nicotine that the smoker is getting when he smokes the cigarette, is that increasing?

A. No. That's staying the same, unless the manufacturer decides to change it.

Q. You were asked a number of questions and shown a number of documents from some investigators at Lorillard that talked about pH of smoke and free nicotine. You remember those documents that you were shown?

A. Yes, I do.

Q. Were those documents that you were looking at part of the Nicotine Augmentation Project that we talked about on your direct?

A. Yes, they were.

Q. And were those discussions about pH and free nicotine theories that were being discussed as part of the Nicotine Augmentation Project?

A. They were.

Q. And in fact, did Lorillard add anything to its cigarettes to change the pH of cigarettes that it sold to the public as a result of those discussions?

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

A. Not a result of those discussions, nor do we add anything, period, that changes the pH.

Q. And does Lorillard add anything or do anything to its cigarettes that it sells to the public to change the free nicotine in its cigarettes that the smoker gets?

A. No, it doesn't.

But let me correct one thing I said earlier, that we do not add anything that changes the pH.

It's well-known that some of the sugar additions that are made to cigarettes lower the pH over that that you would have in tobacco without the sugar added.

Q. So the only thing you've done lowers rather than raises pH?

A. Over the native tobacco, yes.

Q. You were shown a document by Mr. Rosenblatt, a letter that you received from Mr. Seligman?

A. Yes.

Q. That had an attachment to it called Subjects to be Avoided. Do you still have a copy of that up there?

THE COURT: (Handing)

A. Okay.

Q. And you were giving an answer, and your

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suddenly http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

answer was cut off, and I would like to ask you if you would like to finish your answer --

MR. ROSENBLATT: Well, excuse me, Your Honor.

THE COURT: I already ruled on that.

MR. ROSENBLATT: I know it was your ruling. He's making it seem like I cut him off.

MR. ROSS: Your Honor, if he wants to go sidebar --

THE COURT: Gentlemen, please. I made my ruling. You know what my ruling is.

MR. ROSS: Yes.

THE COURT: Okay.

BY MR. ROSS:

Q. Dr. Spears, I would like you to look at the second page of that document that you were talking about, Potential Long-Term Scientific Studies, and explain to the jury the nature of the studies that Mr. Seligman was suggesting should be done; and in so doing, whether or not the results of those kinds of studies could conceivably be adverse to the tobacco industry.

A. Yes, I think all of the studies listed -- let me just make sure.

There are 17 suggestions, and I see only one that might be -- one might say would be positive,

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suid/wvt07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

potentially to the industry, and that is: Positive effects of smoking. The rest all could lead to adverse effects as far as the research conclusions.

Q. And are the subjects that are proposed as potential long-term scientific studies that should be done, are those studies all relevant to the question of smoking and health and whether smoking is a health hazard?

A. Yes, they are.

Q. Would you give the jury just a couple of examples of that?

A. Yes. Relevance of long-term tests in man in biochemical terms: Investigate threshold of carcinogens from various species with specific chemicals; investigate end points of bioassays, especially inhalation; smoke-related effects in respiratory system using single or multiple smoke components. There are many of them that are of that same kind of direction.

Ambient smoke, any danger to the nonsmoker.

Q. Did Lorillard ever make any kind of agreement with Philip Morris to avoid any subjects, such as the ones that are talked about in here?

A. No.

Q. From your knowledge, did anybody in the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

tobacco industry ever make an agreement with anybody else in the tobacco industry to avoid doing research in the subjects that are on the third page of this document?

A. No.

Q. You were asked some questions about whether pH raises free nicotine in cigarettes, and you said those were the postulates of some investigators back then, and that you don't agree with them; is that correct?

A. That's correct.

Q. From the research and work that you're familiar with today, has it been shown that increasing pH in cigarettes has no effect on the free nicotine levels that the smoker gets?

A. I'm not sure we can say that. Certainly, we have studied many additives to tobacco which have been suggested by others would alter the pH, and pH as measured -- I'm talking about on the particulate, collected particulate, and then putting it in water for the measurement.

We do not find that ammonia increases the pH; we do not find that -- compounds that contain ammonia, ammonium salts, over a range of application, do not change the pH.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Buttp://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

We have found that there are some other things that do change the pH; none of which do we use.

Q. You were asked a couple of questions about the Tobacco Working Group and the conclusion of the Tobacco Working Group.

In your judgment, Dr. Spears, would it have been beneficial if the government had not terminated the work of the Tobacco Working Group?

A. That's a hard question to answer, because you don't know what the results would have ultimately been. But I think certainly it would have been beneficial to the scientific community in terms of the data that was being produced and would have been produced.

MR. ROSS: Thank you, Dr. Spears. No further questions.

THE COURT: All right. Doctor, you may step down.

THE WITNESS: Thank you.

(The witness exited the courtroom.)

THE COURT: Okay. Now, I have to discuss some matters with the attorneys, and depending on the outcome of that, we will determine whether or not we're going to have an afternoon session.

So let me just put you in there as a break for a few minutes until we make that determination. I

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

understand you've got -- Joe? You've got something important in that envelope?

THE BAILIFF: Yes. Their money.

THE COURT: The checks are in.

(The jurors exited the courtroom.)

THE COURT: Now, we have an issue to take up regarding whatever testimony should be presented this afternoon.

Now, the name of the person we're talking about is?

MS. ROSENBLATT: Dr. Adam Wanner and Dr. Pearlman. We have a motion to strike the designations, which I'm ready to address right now. I prepared a memo last night, and I went through -- I gave Your Honor some of the supporting transcripts. The blue tabs, those are my only copies. But some of them are in the memorandum, a few excerpts to give you a history of this situation.

So it's only the little blue tabs that are relevant. Those are the times this topic has come up about Dr. Wanner, cumulative testimony and so forth.

THE COURT: Okay.

MS. ROSENBLATT: Our motion regarding Dr. Wanner -- and it wasn't about Dr. Pearlman until recently, because Dr. Pearlman's designations just came

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

in last week or in that vicinity. But our motion about Dr. Wanner was first presented to the Court on November 20th, 1998.

THE COURT: Let me go -- are these in order?

MS. ROSENBLATT: Yes. And I actually have it within my memo, Your Honor. I have the specific language quoted. But I'm going to go through a little case law first and get to it, make my little presentation.

So we have the transcripts of November 20, November 24th. Your Honor deferred ruling.

THE COURT: Wait, wait, wait. I've got November 3rd -- 2nd and 3rd.

MS. ROSENBLATT: Right. I went through a chronology of everything. It's all in there.

THE COURT: November 12, November 16. Here is November 20.

MS. ROSENBLATT: Right. In order to do it in chronological order, I'm probably going to start with November 3rd, because I'm going to go through the various motions to strike expert witnesses because of cumulative testimony, leading up to the situation with Dr. Wanner.

The bottom line is, we suggest to the Court -- and the reason we filed our motion to strike,

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

it would be extremely unfair for the defendants to prevent us from using, as they called it, a fifth pulmonologist, a fourth or fifth doctor to testify on cardiology, and then designate excerpts from a discovery deposition where his whole testimony is presented unfairly.

And we were willing, and we remain willing, and we had told counsel and the Court, to bring these experts in, but there were objections that they were cumulative.

THE COURT: Which document are you going to be reading from?

MS. ROSENBLATT: I'm reading from my renewed motion to strike.

On the second page, I go through a few cases establishing Florida law; what law there is we feel very strongly supports our position.

Firstly, in the event Your Honor were to overrule our motion to strike, the witness is their witness. It's their expert. It would be highly prejudicial -- and several courts have so held, it would be highly prejudicial for the jury to be advised that this was an expert we retained. This is a discovery deposition. And then it would have to be explained: We wanted to put this expert on, but the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

defendants objected as cumulative, and then they were -- those excerpts were read.

Thundereal versus Sterling, 368 Southern 2d 923, the First District 1979, stands for the proposition that where a party uses a deposition of an expert at trial, retained by his opposition, he makes that expert his own witness.

Now, I have the cases that I'm referring to. Well, they're not collated. But I'll get it to you afterwards, Your Honor. I have the cases here. And Florida courts have also recognized it would be prejudicial to permit a party calling a witness to bring out the fact that the expert was originally retained by the opposing party.

Sun Charm Ranch versus City of Orlando, 407 So.2d 938, Fifth District, 1981; Jacksonville Transportation, 559 So.2d 330; and Peterson versus Willie, 81 Fed. 3d 1033, the Eleventh Circuit, 1996.

Now, the Peterson case out of the Eleventh Circuit is particularly informative, because it goes through a very detailed discussion --

THE COURT: Maybe I ought to slow you down here. Is this an issue that's going to come up?

MR. HEIM: Yes, sir.

MS. ROSENBLATT: Well, they designated

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

portions --

THE COURT: The fact that you want to refer to this witness as their expert?

MS. ROSENBLATT: Yes.

MR. HEIM: Yes, yes, and for a very express and particularized reason.

THE COURT: I'll get to yours. I didn't know that's what you wanted to do.

MS. ROSENBLATT: Yes. What I may do, Your Honor, is just hand you. As I'm referring to these cases, I'll hand you -- there's four cases total. (Handing)

In Peterson versus Willie --

MR. HEIM: Do you have copies for me too?

MS. ROSENBLATT: Okay. (Handing)

In Peterson versus Willie, it held the trial court, which was Judge Kehoe, had erred in permitting counsel to elicit the fact that an expert had previously been retained and designated as a trial witness by the opposition.

Now, all of these cases presuppose a situation not like ours, a normal situation where we were not precluded from using the witness. And even in that -- I am reading from the memo.

Several courts have noted the prejudice that

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

results from informing a jury that an expert had been originally consulted by the opposing party.

Then it cites Rubel versus Eli Lilly & Company, the court quoting Charles A. Wright, Arthur Miller and Richard Marcus, Federal Practice and Procedure, described this prejudicial fact as explosive.

Courts have differed in their approach to such situations. Some have permitted a party to call a witness originally consulted by the opposing party, but prohibited the party from offering evidence that the witness had been previously consulted by the opposing party.

Other courts have refused to permit the expert to testify at all, absent the showing of need.

And then the court goes on to say: Once a witness has been designated as expected to testify at trial, there may be situations when the witness should be permitted to testify for the opposing party. In such situations, however, we believe that a party should not generally be permitted to establish that the witness had been previously retained by the opposing party.

While there may be situations where this fact should be disclosed to a jury, we believe that the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

unfair prejudice resulting from disclosing this fact usually outweighs any probative value. Here we find the District Court erred in permitting the appellee's counsel to elicit the fact that Dr. Lichtblau had been previously retained as an attorney representing Peterson.

In that case, it was not prejudicial error. It was still under the Harmful Error Rule, but it was definitely an error on the part of the court. And the Eleventh Circuit explained that the instance where it would be appropriate perhaps would be if the witness were testifying live and the lawyer who originally -- the party who retained him was challenging the qualifications of that witness. Then it would be appropriate for that information to come out.

Now, I want to go into a little history, Your Honor, of how this situation came up.

On November 2nd, 1998, and I'm citing -- I went through the transcript and put it in my memo: Transcript 12807, Mr. Moss argued that there had been four witnesses dealing with COPD, chronic obstructive pulmonary disease, and lung disease, excluding Dr. Petty, who was getting ready to testify.

Mr. Moss: It's my understanding that Dr. Petty is being offered to testify with regard to

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supplied by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suggested http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

causation and lung disease, both cancer and this COPD.

The concern we have, and we want to raise it with the Court, is that we have now had, including Dr. Petty --

THE COURT: Excluding.

MS. ROSENBLATT: Excluding, I'm sorry.

-- Dr. Petty, one, two, three, four witnesses that have dealt specifically with diseases of the lung, lung cancer, COPD: Dr. Richmond, Dr. Staples, Dr. Joe Davis and then Dr. David Carr; four of them.

And then he further argued that Dr. Carr and Dr. Petty were pulmonologists. The Court reminded us that there were two experts permitted per specialty.

On November 3rd, the following day, the transcript reveals Mr. Heim made the following argument: I would suggest or urge Your Honor that with regard to lung disease and pulmonology, and I know he has other things to do other than causation, but this would be excessively cumulative to have Dr. Burns -- now we're dealing with Dr. Burns -- do more on the cause of lung cancer and COPD and the like. But that's it. I raise that now because I want to do it early.

Okay. Dr. Burns of course was a pulmonologist as well as Dr. Petty.

So November 12th, Mr. Kirby argued that

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suggested http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Dr. Grossman -- and Dr. Grossman, if you recall, was shown by video. He is a cardiologist -- that Dr. Grossman's testimony would be cumulative, since he would be the ninth witness giving testimony about heart disease as it relates to smoking.

And Mr. Reid stated: Our last point on this, Your Honor, I would like to make is the general position on this particular witness. With this witness, this will be the ninth witness giving testimony about heart disease as it relates to smoking. I think the Court will remember Dr. Staples particularly, who brought part of a heart in and showed the jury. He was the lung and heart, and he talked about the surgery and the problems that happen.

Mr. Reid then stated: You have Dr. Richmond, Davis, Staples, the other Davis, Petty, Burns, Samet.

Again, November 16th, Dr. Douglas Johnson, who practices pulmonary medicine, Mr. Ross this time argued that his testimony would be cumulative.

Mr. Ross: If Your Honor will recall on Thursday, I believe it was, Your Honor ruled Dr. Johnson, being the fourth pulmonologist who is being called by plaintiffs, was not going to come here and testify as to his cause opinions because of the violation of the Court's order and the cumulative

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

nature of his testimony. He is another pulmonologist.

And then Mr. Rosenblatt responds: In view of what Your Honor has said, I do not intend to ask him: Does cigarette smoking cause lung cancer? Because, as I have understood your ruling, you've told me not to. He is a pulmonologist.

Mr. Ross: And Your Honor has already ruled that we're not going to have a fourth pulmonologist come in and give his disease-causation testimony.

As a result of these arguments -- Dr. Wanner is a pulmonologist at the University of Miami; Dr. Pearlman is a cardiologist. They were not called as a witness on our case in chief, and then as to Dr. Wanner on the issue -- what happened is we received, shortly before November 20th and after this last hearing, we received designations as to Dr. Wanner.

Then Stan brought that up in the transcript on November 20th, 1998. Okay.

This is Mr. Rosenblatt: Another issue, Judge, concerns Dr. Adam Wanner. A very brief background. Dr. Wanner is a pulmonologist at the University of Miami School of Medicine, and Your Honor remembers very well that there were repeated motions about duplication of testimony. We've had Burns, we've

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

had Petty, we've had too many pulmonologists. It's cumulative.

So my response to that was: Okay -- I was trying to get in Dr. Johnson's testimony. I said: Okay, we won't call Wanner.

Now, what I'm getting at is, they're designating their discovery deposition of Wanner to use, which is just very unfair. And I think they're taking an inconsistent position because they cannot on the one hand argue to exclude a witness, and then when he's excluded, designate portions of his testimony out of context from a discovery deposition to read.

And this is still on our case, of course, November 20th.

So far as I'm concerned, there are one of two solutions: Either they can't have the designations, or they can, but then I have the right to call Dr. Wanner.

But that puts us totally in a box, if they can read what they want to read from their discovery deposition of Dr. Wanner and I'm not able to call him.

And Your Honor said: That's an interesting dilemma.

Mr. Moss: Judge, I understand Mr. Rosenblatt. We have a response to this, but we need to make it on Monday because I don't know what it

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

is.

Mr. Heim: On this one I think I'll duck until Monday when I've had a chance to look at it, but I understand the issue.

Well, it came up and came up again on Tuesday that following Tuesday, November 24th. Stan brought it up to the Court stating -- and this was a very lengthy portion of the transcript. I just have little excerpts here:

You remember I brought up the issue of Dr. Wanner. Dr. Wanner is a Miami pulmonologist.

And again, Stanley agreed it would be very unfair to permit the excerpts to be read.

And Mr. Reid's -- Mr. Reid's response and the defense response was basically we don't want him to testify, it's cumulative, but we still have the right to read its excerpts.

Mr. Reid said: But it boils down to, it is still cumulative. Just because there might be a part we want to read later on in our case does not mean it's not cumulative now. It would be unfair to allow the fifth pulmonologist to come in and testify, or whatever we are up to.

So Your Honor then suggested: Well, if you're calling him as your witness, then wouldn't the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

plaintiffs have the right to take his deposition?

And Mr. Reid -- discovery deposition.

Mr. Reid then disagreed.

Mr. Reid: He could not take another deposition to read to ours, because it would be our case, not his.

THE COURT: Wait a minute. Wait a minute. I want to see where you are.

MS. ROSENBLATT: This is the bottom of -- I had been on TR 16192.

THE COURT: Okay.

MS. ROSENBLATT: And then the Court: We are running into a lot of little technical problems.

THE COURT: Wait, wait, wait, wait. I want to just see that, because --

MS. ROSENBLATT: I may have marked in a little yellow --

THE COURT: They're all marked. I just wanted to see exactly where you are.

MS. ROSENBLATT: I think it's between 191 and 193.

THE COURT: Okay.

MS. ROSENBLATT: The Court: I'm just trying to figure out how to do it fairly so that everybody gets a fair shot.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

And respectfully, Your Honor, we're not getting a fair shot here.

And then --

THE COURT: Wait. I want to see what happened with this deposition issue.

MS. ROSENBLATT: Well, it was never determined. I'm going through --

THE COURT: He says he couldn't take another deposition to read to ours because it would be our case and not his.

MS. ROSENBLATT: Yes. They took the position that if they made this doctor, Dr. Wanner, their witness, that we would not be able to take a deposition of him.

And Your Honor said: Well, let's suppose, for example, they withdrew him and there was no deposition. You would call him. If you figured you were going to call him, wouldn't it be fair that they would have an opportunity to take his depo?

And Mr. Heim said: Yes, except that --

And Reid said: Well, they'd have to list him.

And the Court said: Well, you'd have to list him, too.

And Mr. Reid said: We would have had to list

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

him.

The Court: Did you in this case?

Mr. Heim: No.

The Court: Well, how can you read his depo? They withdrew him.

That's I think at 16193.

Then Mr. Reid said: I think when you talk about fairness, the plaintiffs have been able to put on a lot of pulmonologists already. The jury has not heard from a lot of them. The plaintiffs are not going to be prejudiced by putting on the fourth or fifth, whatever number it is, pulmonologist.

Then Your Honor said: It depends on what you want to read, that he cannot counterdesignate, is the point.

Then Mr. Reid said: We need to get the deposition out.

And Mr. Heim: I think we need to look at it.

Mr. Reid: When we get to our case.

Mr. Heim: Because I don't remember what it is.

Then Mr. Reid said: It may be hypothetical, too. We just had to do this in five days.

Now, I presume they mean from the time they knew we weren't going to use him. They had five days

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

to designate.

So Your Honor said: Look through the deposition. See if you can figure something out. See if you can work together, and maybe you can agree on what you want to do.

I went through the deposition. Mr. -- I mean, Dr. Wanner is a very, very highly-skilled, excellent pulmonologist, who basically came in cold turkey to this discovery deposition. He acknowledges he spoke a total of five minutes to Stan, just -- agreeing to be a witness. He had not reviewed the Surgeon General's Reports or the literature. He was planning to do that before the trial.

He was led -- he agreed to a lot of things. We asked a few questions, John Hoag of our office at the end, and what we were willing to do -- they would have had the benefit of a very favorable discovery deposition.

We wanted to put him on live. He would be prepared. He would have reviewed the information. They could have cross examined him on whatever they had in the discovery deposition. But that was not enough.

It wasn't enough that they had the advantage of that discovery deposition, which admittedly is very favorable from their perspective.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Now they want to handcuff us, not permit us to put him on, and even at the November 16th hearing, Mr. Reid repeatedly argued that that was cumulative, we shouldn't be permitted, and somehow distort the pretrial order to permit this procedure.

This procedure makes no sense in this case. And exactly the same thing is happening with Dr. Pearlman. I have not completed Dr. Pearlman's deposition. These are 200-plus-page depositions. There were extensive designations. There are very extensive cross-designations. They're trying to show the relationship that we had hired them, and somehow put this all out of context.

And the bottom line, Your Honor, is it's very, very unfair. There's really no basis for doing that, and we had only -- and I know counsel said yesterday that we had read portions of their witnesses.

I was very, very cautious in doing that, to have employees, representatives of the industry, where they're adverse witnesses. I certainty didn't want to put in my case someone where I'd be bound by their testimony, because I knew there would be cross-designations.

And here, you know, clearly they'd be bound by the testimony under the case law, and I don't

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the Industry Documents Library: http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

believe there could be any reference to the fact we hired them.

But more fundamentally, under the circumstances where we were willing to bring them in, it's very unfair. They should have let these witnesses testify, specifically with Dr. Wanner. They could have said at the hearing of November 16th, when Stan offered and said that's a solution, we'll bring him in. He's another pulmonologist, we'll put him on. Then they could have cross examined him to their hearts' content. But it wasn't enough. It's -- they want everything.

And I -- most respectfully, I think you've got to draw a line. I don't have -- I looked for the pretrial order. I cannot locate it. I cannot imagine it sanctions this type of procedure. But if it does, I think it ought to be changed. Because this is very unfair, and it basically is a loophole of sorts, which is trying to be used to their advantage.

THE COURT: With reference to the statement that you're going to withdraw Dr. Wanner, when was the deposition taken? Before that statement or after that statement?

MR. HEIM: Before.

THE COURT: Okay.

MS. ROSENBLATT: Before. Dr. Wanner and

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

Pearlman had both been designated as additional witnesses. I'm not sure if it was even before. It might have even been after the cutoff.

There were additional people that were going to testify, and Dr. Wanner was deposed October 30th of '98. At one of the earliest hearings -- and it's in the transcript -- there was a comment about we're probably going to withdraw, then, Wanner, when they were arguing about the additional pulmonologist. That was brought up.

THE COURT: That was prior to the deposition?

MS. ROSENBLATT: It would have been -- after. He was October 30th -- November.

THE COURT: Here's what I'm trying to figure out. You listed him as a possible witness?

MS. ROSENBLATT: We designated him, right, as one of our witnesses.

THE COURT: And they took a deposition?

MS. ROSENBLATT: Correct.

THE COURT: And the decision had not yet been made as to whether you were going to call him or not. He was at that time a potential witness.

MR. HEIM: On their witness list.

MS. ROSENBLATT: We had more than the two.

THE COURT: And subsequent to the deposition,

http://legacy.library.ucsf.edu/tid/wtf07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

this issue was raised, and then you decided not to call him?

MS. ROSENBLATT: Well, we knew we had a limit. If we called him -- we said: Who's better? Burns, Petty.

THE COURT: That's not the point. The point is you made that decision?

MS. ROSENBLATT: Yes.

THE COURT: And that was after the deposition.

So the question in my mind was: Why wasn't the deposition conducted as a complete deposition, as a witness would be deposed --

MR. MOSS: He was.

THE COURT: -- in a normal case?

My understanding is that you didn't do much on the deposition and only asked a few questions.

MS. ROSENBLATT: Well, he's here, right at the University of Miami. We knew he would definitely testify live. We were in trial. See, it was October 30th. We were in trial. John covered the deposition of an expert because --

THE COURT: Okay. So it wasn't for the purpose of trial testimony, just discovery?

MS. ROSENBLATT: No, no, this was purely, and

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suggested by http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

the same with Dr. Pearlman.

THE COURT: And he's still here live?

MS. ROSENBLATT: Sure. He could come in. We could call him out of turn, and we're willing to put him on.

Now, Dr. Pearlman, we didn't ask a question. I think there were two pages of questions, to clarify a few points, that John asked.

But with Pearlman there was zero, no questions asked by Stan. It was purely discovery.

He's willing to come. We're willing to put him on. It's just that we realized, based upon the argument and the number of witnesses -- and we're willing to put both of them on now. That's always been our position.

THE COURT: All right. Let me hear from the other side.

MR. HEIM: Your Honor, the fact -- I'm going to be briefer because I don't have a lot of transcripts to read on the subject, and I didn't have their transcript references.

But let me tell you my understanding and background of all this and why this is important and why this is not a matter of catching anybody by surprise. It's not an end run. This is direct. It's

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

probative, and it's very important, and you'll hear why in just a moment.

It is correct that the plaintiffs named more than two, that's an understatement, of possible experts, put them on their witness list in different fields: pulmonologists, cardiovascular specialists. They named them. They said: We're calling these people at trial.

We took the depositions, just like they took the depositions of our experts. Everybody's deposition was taken. No distinction was made when they took the depositions or when we took them as between a discovery deposition and a trial deposition. Everybody understood this is a deposition that you're taking to be used in accordance with the pretrial order one way or the other, to be used for cross examination, to be used for substantive evidence.

There was no: Well, we're just doing this for this purpose or that; nor do the rules contemplate that. It was very direct. It was a thorough procedure on both sides.

So, what then happened was, when plaintiffs were put to choosing which ones they were going to use, the reality is, if we're going to be candid, is that plaintiffs went back and looked at their depositions --

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Suid/wvt07a00/pdf www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

no surprise -- to make a judgment, who were they going to use?

What they found was that for Dr. Wanner and Dr. Pearlman, there were a lot of things that they said that they didn't like in their depositions. And so when they were trying to decide who to call and who not to call, they said: Why do we want to call Dr. Wanner, why do we want to call Dr. Pearlman, when in their depositions they had said some things that are really not very good for us?

And what they said is critically important, and it goes to why we want to and should be entitled to and should be allowed to, under the rules, establish through their testimony that they are plaintiffs' witnesses.

Now, let me explain to you why that is. We are not designating areas of their testimony that is cumulative of what has already been said by plaintiffs. Far from it.

Dr. Wanner and Dr. Pearlman have said, among other things, that certain diseases, which plaintiffs contend are associated with smoking or are caused by smoking, are not caused by smoking.

And more importantly and critical, Dr. Wanner, who is a physician -- and you'll recall

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

this mantra from the trial -- a physician who is not identified with, paid for, or associated with a tobacco company or the tobacco industry. Far from it. He was retained by plaintiffs.

He testified that reasonable people can differ, reasonable scientists can differ on whether or not it has been scientifically proven that smoking causes disease. Now, he testified to that in his deposition.

Plaintiffs have said that is not only unreasonable for the tobacco company witnesses to take that position, but that it's fraudulent to take that position; that there isn't a medical doctor anywhere in the whole world that would come into this courtroom and testify that that's a reasonable position to take.

And here's one in their own backyard, who was called to testify by them, who has said that in his deposition.

And that's why we want to put that deposition testimony on, and that's why it is critical for us to be able to show that he is not identified with the tobacco companies. There is no reason for us to offer the testimony otherwise, other than for that very, very critical, very probative point.

So, that is the key to this deposition

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

designation. And if we were to put it on without identifying him as being a plaintiffs' witness, the jury would mistakenly believe, mistakenly, that this was just another tobacco company witness who was paid for by the tobacco companies, who was taking a position, and that it fit very nicely into the argument that they have been making and the evidence that they have been trying to present to this jury, when in fact it's not; it's just in fact the opposite.

So, that is the testimony that we want to elicit. And we believe we're entitled to do that under the rule.

The rule -- already several reasons why this should happen. One is for the substantive point. But the rule, since it was amended in 1990, also permits a defendant to -- or a party to put on a witness and to show that witness' bias. And that bias has been established by the Third DCA in a case called Del Monte Banana Company versus Chacon, that he is affiliated, associated or identified with the other party.

A witnesses' relationship to the party or the fact that a witness is being paid by a party to testify goes to the witness's interest or bias; and any party can establish that, under the rule.

That's what the Third DCA had said, since the

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

amendment to the Florida rule in 1990, that effectively permits any party to do that with any witness.

THE COURT: I'm not sure we're talking about that in this matter. I don't really think that is a part of it.

MR. HEIM: Well, that's the procedural rule, which if we had to invoke a rule, I would say applies.

But the more important substantive point is when the plaintiffs come forward and say these things to this jury and say there is no doctor, no medical doctor, then --

THE COURT: Well, if you walked in with one, not one that they have -- they even designated, just walked in with one out of the clear blue sky --

MR. HEIM: That's what we're doing with this designation.

THE COURT: I understand that. Then they would be hung by their own pitard, right? I don't see this whole concept here that you've got to relate it to the plaintiffs' witness.

I still think there's this case out there that I read sometime that talked specifically about this point.

MR. HEIM: We looked for it last night. Your Honor, I wonder whether it was this case that was

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

cited. And I don't know, but I saw it in the case that counsel handed me, the Eleventh Circuit case. That of course is referring to the federal rules.

They do cite -- they actually cite a Fourth DCA case seemingly in support of what we're saying here. And I wondered if that might be the case.

Does that ring a bell, Your Honor?

THE COURT: I don't know. In the back of my mind it discussed the fact that a person was consulted as an expert. They really didn't like much what he said, but the fact that he was consulted prevented the other side from using him on their side of the case; that there was some prohibition about it. And if they did use him, they certainly couldn't identify him as a plaintiffs witness. I'm not sure any of these cases are the ones I'm thinking about.

MR. HEIM: The case that is cited by -- the Peterson court, the Eleventh Circuit Court, is Broward County versus Cento, which is a 1993 Fourth Circuit case which seems to draw a distinction between an expert that has been consulted by one side and an expert that has actually -- actually been listed as a trial witness. And that is the situation we have here.

THE COURT: Well, there might be a distinction there. There's also the Rubel, R-U-B-E-L,

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

versus Eli Lilly, which they cite.

MR. HEIM: In the Southern District of New York.

THE COURT: Yes, I know. But I'm looking for substance, which has an entirely different approach to the situation. It's a touchy issue, a very touchy issue.

MR. HEIM: Judge, the testimony we want to put in is not cumulative testimony. It's testimony that runs counter, expressly counter to a central allegation in this case, that there is no -- that the position that there is no scientific controversy or there is no scientific proof is way out of whack. And this one witness --

THE COURT: Well, that may be. That may be the case. The question is how it's presented to the jury, and that's the issue.

MR. HEIM: And Your Honor will remember that with Dr. Arnett, they found it important to establish that he had been retained originally by the defense. Do you remember that, when Dr. Arnett was testifying?

THE COURT: No. I really can't say -- I mean, that issue. I don't remember that issue.

MR. HEIM: Yes, it came up. This was when Mr. Rosenblatt was saying: Well, some Philip Morris

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

lawyer contacted you, right, and you decided not to testify for them?

Do you remember? Maybe -- there's been a lot of witnesses. But that actually did happen in this courtroom. They established that the witness was originally contacted by the defense, and now he was testifying for the plaintiff.

Now, this is --

THE COURT: In this case was contacted or another case?

MR. MOSS: This one.

MR. HEIM: This case.

THE COURT: That he had been contacted by the defense in this case?

MS. ROSENBLATT: In a different tobacco litigation, in the State of Florida case.

THE COURT: That's what I'm saying. It was probably another case.

MS. ROSENBLATT: Right, exactly.

THE COURT: But it wasn't in this case.

MS. ROSENBLATT: Not in this case,

THE COURT: It wasn't in this case that he was consulted to testify for? You're talking about the West Palm Beach or --

MS. ROSENBLATT: Apparently, right. The year

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

before.

MR. HEIM: But it's the same point.

THE COURT: That's a little bit different.

MR. HEIM: Let me tell you why it's the same. What they're saying to the jury was: You didn't like the defense position in the case, in a tobacco case, so you came around and testified for the plaintiffs. That's the point of asking him that question. What other point would there be?

And we're not going that far, even. We're just simply saying it was reasonable. And he said yeah, it's reasonable.

THE COURT: Let me just real quick, a couple of things. I'm not really satisfied with this issue, resolved in my own mind about it. There's a lot of things about it that don't sit right.

But, if I do allow him to testify, with the scenario that you cannot relate him to a prior plaintiffs' witness, and you just put him on as a witness of your own, if I do that --

MR. HEIM: Well, then, I wouldn't put him on.

THE COURT: That's what I mean.

MR. HEIM: No. I wouldn't put him on, because the jury would have the mistaken impression that it was just another tobacco company witness.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: Okay. And that would relate also to the other doctor?

MR. HEIM: Yes, sir.

MR. KIRBY: Your Honor, may I make a brief comment with respect to the -- an additional applicable rule?

THE COURT: Sure.

MR. KIRBY: It's 1.330, which deals with the use of depositions in court proceedings.

THE COURT: Wait a minute. I think I know which one you're talking about. Let me go take a look.

MR. KIRBY: Page 63.

THE COURT: You can use it for any purpose whatsoever. Go ahead.

MR. KIRBY: That's correct. Your Honor, beginning at 1.330, Subpart (a), states that at trial or upon a hearing or motion or interlocutory proceeding, any part or all of the deposition may be used against a party who was present or represented in taking the deposition, et cetera.

Now, obviously, the plaintiffs were represented at the taking of the deposition, their designated expert.

If you turn to the next page, Your Honor, you will see Subpart (a)(3) states -- and I'm going to read

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

the introductory part down to the colon, and I will read the last subpart and skip everything that doesn't count.

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds -- all the way down to the bottom of that Subparagraph (f), the witness is an expert or skilled witness.

THE COURT: I'm familiar.

MR. KIRBY: So the rule expressly provides for it.

And Your Honor, the construct that the plaintiffs have created in this courtroom by asking the question: Can you name one physician, one M.D., one hands-on treater who is not working for -- has never worked for the tobacco companies? By constructing it that way --

THE COURT: Uh-huh.

MR. KIRBY: -- if you don't permit us to make this point, we can't refute that argument.

THE COURT: Well, I don't buy that.

MR. KIRBY: At the time that construct was being put in front of this jury, by the plaintiffs, the plaintiffs knew that such a person existed and was residing on their witness list. It was their own

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

designated expert who testified that reasonable people could disagree.

THE COURT: I don't think that cuts the argument, frankly.

MR. ROSENBLATT: I would just --

THE COURT: The other problem I have is that you folks didn't list him as a witness.

MR. KIRBY: We listed experts designated by other parties and the pretrial stip order expressly provides for this type of designation.

THE COURT: Okay.

MR. KIRBY: -- in the event of -- within five days.

THE COURT: That's the general thing, the catch-all.

MR. KIRBY: It's not a catch-all, Your Honor, at all.

THE COURT: Sure it is.

MR. KIRBY: In this pretrial it's express.

THE COURT: You know as well as I do, you list a witness and any other witnesses listed on the plaintiff's witness list. Everybody does that.

MR. ROSENBLATT: Catch-all.

THE COURT: Everybody does that. That's the catch-all.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

MR. MOSS: But it allows you to call the other people's witnesses.

THE COURT: That's what I'm saying. Didn't say specific.

MR. ROSENBLATT: I want to say, Judge, back -- you've seen that in the questioning of these witnesses, many times we're referring to depositions from as long ago as 1993. And you remember from going over these depositions that was a repetitive Rosenblatt question: Can you name one medical -- they had all the time in the world to list -- now it's a gotcha thing. We are in trial here --

THE COURT: All right. Here is the problem. If you don't call this witness, if I rule against the defense position and you don't call this witness, what are you going to do this afternoon?

MR. ROSENBLATT: Nothing.

MR. KIRBY: Go home.

THE COURT: Okay.

MR. ROSENBLATT: They don't have a live witness.

MR. HEIM: No. We don't have a live witness until tomorrow morning.

THE COURT: Okay.

I'm going to rule at this point that if you

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

want to call the witness you can, and you can put him on in the matter that you do, but you can't make reference to him as a prior plaintiffs' expert, okay? You do what you will with that.

So if you're not going to use him this afternoon, I will excuse the jury. We can take this matter up at another time. If there's any change in the law, and I still think there's a case out there. But tentatively at this point that's what I'm going to do.

MR. MOSS: And at a later date if this all --

THE COURT: Maybe, maybe.

MR. MOSS: No, no.

THE COURT: My rule will stand unless I find evidence to the contrary.

MR. MOSS: I understand. I wasn't arguing with you. But I said if your ruling still stands, at a later date we will make a proffer, that's all.

THE COURT: All right. Or you can just put the deposition in if you want to, you know, as part of the record.

But that's the way I feel about it at this point. I think that's the appropriate way to do it. I understand your position; I understand what you want to do. I just understand their position, but I don't

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Subject to http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

think it's the appropriate way to handle it. I'm not preventing you from putting him on as a witness, but you cannot use him as a designated plaintiffs' expert.

MR. HEIM: Your Honor, what we'll do is we will defer and certainly not put any testimony in based on Your Honor's ruling now. We're going to look to see if we can find that case and see whether we can find any authority that might persuade Your Honor.

THE COURT: If there's another authority that persuades me, we always have the opportunity to do it. There is another option also. Call him live and everybody take their deposition and do it appropriately. We can do that, too. It's not as if he's off in Timbuktu someplace. He's here. We'll see what happens. I'll have to get the jury out here and excuse them for the afternoon.

MR. ROSENBLATT: My understanding, is, Judge, from what Mr. Heim says, the witness tomorrow he says will be relatively brief, so tomorrow will be probably a relatively short day, which is fine. I just wanted to make you aware of that.

THE COURT: I told the jury we're going to really whiz bang through this thing.

MS. ROSENBLATT: Judge, our daughter just came in from Israel today. So this is good timing.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

(Discussion off the record.)

THE BAILIFF: Bringing in the jury.

(The jurors entered the courtroom.)

THE COURT: Don't get too comfortable.

Okay. We have been discussing a lot of schedules problems and things of that nature, and it just turns out that we won't be able to present the witnesses today, but we'll have to pick that up tomorrow, which means I'm going to have to give you an afternoon off, unless you just want to stay around and -- didn't think so.

So what we will do is pick the witness up tomorrow. Scheduling problems have arisen and it can't be helped. Okay? So that's what we were trying to find out over this period of time. It's almost a quarter of 1:00 now, so no sense in it. We'll release you for the afternoon. Come back tomorrow at the usual time, 9:15.

(The jurors exited the courtroom.)

THE COURT: Have a seat.

MR. KIRBY: Your Honor, may I raise one more thing briefly before we conclude for the day? It is with respect to the Waxman congressional testimony issue.

THE COURT: Yes.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

MR. KIRBY: I have it marked in the transcript. But you recall when Mr. Rosenblatt was asking Dr. Spears the question: And you heard all the CEOs deny that smoking causes lung cancer, heart disease and other diseases, and I objected, we went sidebar, and there were two arguments.

One was the argument that Mr. Heim had made, which was I thought that testimony was off bounds in this case, and then my objection was that that was a mischaracterization of the testimony.

I have here the testimony before the Waxman Committee given by Mr. James Johnston, the then CEO of R.J. Reynolds Tobacco Company, in which he was asked the following question: Do you agree that smoking causes heart disease?

Answer: It may.

He didn't say: No, it doesn't.

It goes on to say: Do you agree that smoking causes lung cancer? Do you know whether it does?

Mr. Johnston: I do not know.

Now Mr. Waxman goes on: My colleague, John Bryant, said in his opening statement his grandfather smoked all of his life and died of lung cancer. Do you think that lung cancer was caused by smoking?

Mr. Johnston: I don't know.

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

THE COURT: Isn't that essentially what they're saying? We don't know because there's been no scientific proof, basically?

MR. KIRBY: Well, that's not what the question was.

THE COURT: Well, the exact words. But the whole essence was no, they didn't say it did, but they said: We don't know.

MR. KIRBY: No, they said more than that, Your Honor, if I may finish.

THE COURT: I know they said more there. But the general import of the question was they didn't know.

MR. KIRBY: No, sir. If I may, please, the question was that the CEOs denied causation. Denied it. That's the impression that was left with this jury.

Reynolds did not deny causation. In fact, it said: It may.

THE COURT: Okay. In the tenor of the entire case, and all the depositions of the CEOs that were taken, those questions asked of them, the general tenor was: We deny there's causation in the regard that we don't know; it may.

The jury can make up their mind how they view

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

it. I appreciate you putting that in the record.

MR. KIRBY: We have never denied it in this trial or in this transcript.

THE COURT: You can put that in th : rd, too.

All right. We'll see you folks tomorrow.

(Court was adjourned at 12:47 p.m.)

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Supported by www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

TAYLOR, JONOVIC, WHITE & GENDRON
COPYRIGHT 1999V-CALLHRIGHTSGRESERVED

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/zqjl0001

This watermark does not appear in the registered version - http://www.clicktoconvert.com

http://legacy.library.ucsf.edu/tid/wvt07a00/pdf
Support for www.industrydocuments.ucsf.edu/docs/zqjl0001